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THE TERMS OF THE DEBATE: LITIGATION, ARGUMENTATIVE STRATEGIES, AND COALITIONS IN THE SAME-SEX MARRIAGE STRUGGLE

MARY ZIEGLER*

ABSTRACT

Why, in the face of ongoing criticism, do advocates of same-sex marriage continue to pursue litigation? Recently, Perry v. Schwarzenegger, a challenge to California's ban on same-sex marriage, and Gill v. Office of Personnel Management, a lawsuit challenging section three of the federal Defense of Marriage Act, have created divisive debate. Leading scholarship and commentary on the litigation of decisions like Perry and Gill have been strongly critical, predicting that it will produce a backlash that will undermine the same-sex marriage cause.

These studies all rely on a particular historical account of past same-sex marriage decisions and their effect on political debate. According to this account, the primary effect of same-sex marriage litigation has been the mobilization of conservative opponents of the cause. Groups like the Family Research Council and Focus on the Family successfully organized efforts to elect opponents of same-sex marriage and to introduce state constitutional bans.

However, the historical account underlying these criticisms of same-sex marriage litigation is fundamentally incomplete. Leading studies have missed important effects, such as advocacy groups using judicial decisions on same-sex marriage as opportunities to change the rhetorical strategies and coalitions that define the debate. National gay rights groups like the Freedom to Marry Coalition and the Human Rights Campaign responded to important same-sex marriage decisions by stressing equality-based claims. Socially conservative organizations like the Family Research Council increasingly emphasized religious freedom or parental rights. At the same time, seemingly because of the decisions, alliances shifted. Labor and libertarian groups played a less central role while civil rights groups began shaping the alliances on either side. These developments may well prove to be favorable to the same-sex marriage cause.

At this point it is difficult to assess whether the changes studied here will benefit the same-sex marriage movement in the long term. However, without studying all the effects of same-sex marriage litigation, current conclusions about its value are premature and potentially flawed. Litigation might prove to have been much more strategically advisable than some current scholarship suggests. At the very least, the litigation campaign should be judged not by an incomplete historical account but by an assessment of its full impact.

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I. INTRODUCTION

Why, in the face of ongoing criticism, do advocates continue to pursue same-sex marriage litigation? Recently, high profile cases like *Perry v. Schwarzenegger*,¹ a challenge to California's ban on same-sex marriage, and *Gill v. Office of Personnel Management*,² a lawsuit challenging section three of the federal Defense of Marriage Act, have created divisive debate.³ Leading scholarship and commentary on the litigation of past decisions like *Perry* and *Gill* have been powerfully critical, predicting that future litigation would produce a backlash that would undermine the same-sex marriage cause.⁴ Women's and gender studies Professor John D'Emilio has argued that "the most significant outcome of [same-sex marriage] litigation has been the negative legislative and voter response that the [litigation of same-sex marriage cases has] elicited."⁵ Gerald Rosenberg, a law professor at the University of Chicago, claims that, "given the federal Defense of Marriage Act and the legal barriers in forty-five states, [one can argue that] proponents of same-sex marriage would have been better off never having litigated in the first place."⁶ Michael Klarman, a Harvard Law School professor and legal historian, asserts that the Massachusetts Supreme Judicial Court's decision in *Goodridge v.*

1. 704 F. Supp. 2d 921 (N.D. Cal. 2010). For an analysis of the earlier evolution of *Perry*, see William Eskridge, Jr. & Darren Spedale, *Who Will Win the Gay Marriage Trial? A Road Map to the Routes to Victory for Both Sides*, SLATE (Jan. 29, 2010, 10:45 AM), <http://www.slate.com/id/2242957>. For examples of recent coverage of *Perry*, see Michael Doyle, *Justice Kennedy's the One to Watch on Gay Marriage Test*, MCCLATCHY NEWSPAPERS, Aug. 7, 2010, <http://www.mcclatchydc.com/2010/08/07/98790/justice-kennedys-the-one-to-watch.html>; Megan Friedman, *After Prop. 8 Trial, What's Next?*, TIME NEWSFEED (Aug. 5, 2010), <http://newsfeed.time.com/2010/08/05/after-prop-8-trial-whats-next>; Raisa Habersham, *Opposing Groups Plan Proposition 8 Rallies*, ATLANTA J.-CONST. (Aug. 6, 2010, 2:57 PM), <http://www.ajc.com/news/opposing-groups-plan-proposition-586478.html>.

2. 699 F. Supp. 2d 374 (D. Mass. 2010). For an overview of the filings and decisions thus far issued in *Gill*, see *Our Work—Gill et al. v. Office of Personnel Management et al.*, GLAD, <http://www.glad.org/work/cases/gill-v-office-of-personnel-management/> (last visited Apr. 25, 2012).

3. For coverage of the debate produced by *Perry* and *Gill*, see, for example, Gabriel Arana, *Gay on Trial: Why More than Marriage is at Stake in the Federal Legal Challenge to Prop. 8*, THE AMERICAN PROSPECT, Dec. 2009, at 16; Margaret Talbot, *States Rule*, THE NEW YORKER ONLINE NEWS DESK (July 12, 2010), <http://www.newyorker.com/online/blogs/newsdesk/2010/07/doma.html>.

4. See, e.g., *infra* notes 5, 10, and accompanying text.

5. John D'Emilio, *Will the Courts Set Us Free? Reflections on the Campaign for Same-Sex Marriage*, in THE POLITICS OF SAME-SEX MARRIAGE 39, 59 (Craig A. Rimmerman & Clyde Wilcox eds., 2007).

6. GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 416 (2d ed. 2008).

*Department of Public Health*⁷ provoked “thirteen states [to add] to their constitutions language defining marriage as a union between a man and a woman,”⁸ “mobilized conservative Christians to turn out at the polls,”⁹ and “clearly provided the margin of victory for Republican senators in closely fought contests in states.”¹⁰

These studies all rely on a particular historical account of past same-sex marriage decisions and their effect on political debate. According to this account, the primary effect of same-sex marriage litigation has been backlash—the mobilization of conservative opponents of the cause.¹¹ Groups like the Family Research Council and Focus on the Family have been arguably successful in organizing efforts to elect opponents of same-sex marriage and in introducing state constitutional bans of it.¹²

However, the historical account underlying criticisms of same-sex marriage litigation is fundamentally incomplete. Leading studies have missed the ways in which lawyers and gay rights activists have responded to the decisions, often changing the rhetorical strategies and coalitions that define the debate. As we shall see, partly in response to *Baker v. State*,¹³ a Vermont opinion, and *Goodridge v. Department of Public Health*,¹⁴ a Massachusetts decision, national gay rights groups like the Freedom to Marry Coalition and the Human Rights Campaign began stressing equality-based claims. Before the *Baker* decision, such national gay rights organizations encouraged members not to make equality- or civil-rights-based claims. Similarly, between the Supreme Court’s summer 2003 decision in *Lawrence v. Texas*¹⁵ that sodomy bans were unconstitutional and the issuance of *Goodridge*, privacy-based arguments have played at least as prominent a role in same-sex marriage advocacy as did the equality-based arguments that now define public discussion. Responding to *Baker* and *Goodridge*, same-sex marriage organizations and their opponents appear to have shifted the balance of the argumentative strategies that they had used. Gay rights organizations began focusing on claims that linked the same-sex marriage movement of the early 2000s to the civil rights movement of the 1960s.¹⁶ In turn, opponents of same-sex marriage, such as Focus on the Family, the

7. 798 N.E.2d 941 (Mass. 2003).

8. Michael J. Klarman, Brown and Lawrence (and Goodridge), 104 MICH. L. REV. 431, 466 (2005).

9. *Id.* at 467.

10. *Id.* at 468.

11. See, e.g., *supra* notes 5, 10, and accompanying text.

12. See *supra* notes 5, 8, and accompanying text.

13. 744 A.2d 864 (Vt. 1999).

14. 798 N.E.2d 941 (Mass. 2003).

15. 539 U.S. 558 (2003).

16. See *infra* notes 187-93 and accompanying text.

Family Research Council, and the Traditional Values Coalition, less often justified discrimination against gays and lesbians, stressing instead the unique benefits of straight marriage or even the religious freedom of those who did not support same-sex marriage.¹⁷

Advocates in the same-sex marriage debate also used *Baker* and *Goodridge* as leverage in efforts to reshape the coalitions on either side of the issue. The evolution of the debate in Massachusetts offers a persuasive example. Whereas before the decisions, in the late 1990s, state gay rights organizations were able to form alliances only with labor organizations or libertarian groups, *Goodridge* forced minority and civil rights organizations to take a stand for the first time. After *Goodridge*, groups like the Gay & Lesbian Advocates & Defenders (GLAD) and the Massachusetts Gay and Lesbian Political Caucus (MGLPC) were able to win their first endorsements from civil rights leaders like Coretta Scott King and Julian Bond of the National Association for the Advancement of Colored People (NAACP).¹⁸

By understanding the way that cause lawyers and grassroots activists used decisions like *Baker* and *Goodridge* to reshape the terms of the debate and the coalitions participating in it, we will see that the impact of same-sex marriage litigation may be both more profound and more complex than some scholars suggest. At this point it is difficult to tell whether the changes studied here will benefit the same-sex marriage movement in the long term. However, without studying all the effects of same-sex marriage litigation, current conclusions about its value are premature and potentially seriously flawed. Litigation may prove to have been much more strategically advisable than some current scholarship suggests. At the very least, the litigation campaign should be judged not by an incomplete historical account but by an assessment of its full impact. *Baker* and *Goodridge* did not simply increase opposition to same-sex marriage. Both decisions also fundamentally changed the terms of and the players in the debate in a way that may advance the same-sex marriage cause.

My argument proceeds in three parts. First, by tracing demands for same-sex marriage made between 1970 and 1990, Part II describes the mounting criticism of litigation of cases like *Perry* and *Gill*. Part III considers the role of the litigation of *Baehr v. Lewin*,¹⁹ the Hawaii Supreme Court's same-sex marriage decision, in making same-sex marriage a nationally prominent issue and, in doing so, potentially benefiting the same-sex marriage movement. I turn next to a brief examination of the organizational attitudes of major pro- and

17. See *infra* notes 224-28, 240-47, and accompanying text.

18. See *infra* notes 264-65, 270-72, and accompanying text.

19. 852 P.2d 44 (Haw. 1993).

anti-gay-marriage organizations toward same-sex marriage in the years immediately before and after *Baehr*. Part IV studies how *Baker* and *Goodridge* helped to alter the argumentative strategies used by groups on either side of the issue. Looking closely at a case study involving the same-sex marriage debate in Massachusetts, Part V analyzes the way in which the changing terms of the marriage debate helped to reshape the coalitions involved in the struggle. Part VI briefly concludes.

II. PERRY, GILL, AND THE LITIGATION QUESTION

In the face of continuing skepticism, proponents of same-sex marriage have continued to pursue litigation. Nonetheless, critics have pointed to several waves of backlash that have followed judicial decisions favoring same-sex marriage. In 2004, following the recognition of same-sex marriage in Massachusetts, a series of successful state constitutional bans was introduced.²⁰ Some observers attribute the victories by Republican opponents of same-sex marriage in the 2004 elections to the backlash against the *Goodridge* opinion.²¹ From 2008 to 2009, anger about the California Supreme Court's decision in *In re Marriage Cases*²² created intense opposition, culminating in the passage of Proposition Eight, a state constitutional amendment overturning the decision.²³

In the academy, these events inspired a number of attacks on the use of litigation by the same-sex marriage movement. Gerald Rosenberg has written extensively on the courts' inability to create political change, be it in the context of same-sex marriage or otherwise.²⁴ Recently, in writing about the same-sex marriage struggle, Rosenberg suggested that the use of litigation has been entirely counterproductive for the movement.²⁵ As he succinctly writes, "Litigation as a means of obtaining the right to same-sex marriage has not succeeded."²⁶

20. For a discussion of the state constitutional amendments passed before 2006, see ROSENBERG, *supra* note 6, at 357, 361-64.

21. See, e.g., Klarman, *supra* note 8, at 466-68.

22. 183 P.3d 384 (Cal. 2008).

23. For coverage of the impact of Proposition Eight and the controversy it generated, see Janet Kornblum, *Post-Prop 8, Thousands Join Protest: Gay-Marriage Ban in California Stirs Torchbearers*, USA TODAY, Nov. 14, 2008, at 3A.

24. See, e.g., Gerald N. Rosenberg, *Courting Disaster: Looking for Change in All the Wrong Places*, 54 DRAKE L. REV. 795, 796-97 (2006) (arguing that courts traditionally defend status quo and privilege instead of promoting social change); Gerald N. Rosenberg, *The Irrelevant Court: The Supreme Court's Inability to Influence Popular Beliefs about Equality (or Anything Else)*, in REDEFINING EQUALITY 172 (Neal Devins & Davison M. Douglas eds., 1998) (arguing that the Court's decisions do not affect popular opinion about racial or gender equality).

25. See generally ROSENBERG, *supra* note 6, at 339-421.

26. *Id.* at 415.

Michael Klarman, who has written extensively on the backlash produced by controversial judicial decisions, has also suggested that victories achieved through litigation have set back the same-sex marriage movement.²⁷ He has focused on the popular defiance produced by the *Goodridge* decision, arguing that the litigation of the case increased opposition to same-sex marriage.²⁸ He emphasized the ways in which *Goodridge* created backlash: by increasing public attention to the same-sex marriage issue and by attempting to settle the issue before public support for same-sex marriage had solidified.²⁹ Historians of sexuality and sexual orientation, like John D'Emilio, have been equally critical.³⁰

Skepticism about the value of litigation for same-sex marriage has intensified recently because of the prominence of two related cases. Perhaps the best known case, *Perry v. Schwarzenegger*,³¹ involved a federal constitutional challenge to Proposition Eight.³² *Perry* attracted attention for several reasons. First, those challenging Proposition Eight, Theodore Olson and David Boies, often had found themselves on opposing sides of the political spectrum in the past and, in fact, argued against one another in *Bush v. Gore*.³³ Second, at the trial court level, *Perry* dramatically held that Proposition Eight violated both the federal Due Process Clause and Equal Protection Clause.³⁴ Third, as a federal challenge, *Perry* also may well reach the Supreme Court.³⁵

Concerns about backlash have featured prominently in discussion regarding *Perry*. As William Eskridge and Darren Spedale have shown, attorneys defending Proposition Eight have argued in court that the popular backlash likely to follow a same-sex marriage victory in *Perry* would “undermine the legitimacy of the federal courts.”³⁶ Commentators generally sympathetic to the same-sex marriage cause

27. See Klarman, *supra* note 8, at 459-73.

28. See *id.*

29. See *id.*

30. See generally D'Emilio, *supra* note 5.

31. 704 F. Supp. 2d 921 (N.D. Cal. 2010).

32. Lambda Legal offers access to the briefs and other filings in *Perry*. See Lambda Legal, *Perry v. Brown (Formerly Known as Perry v. Schwarzenegger)*, <http://www.lambdalegal.org/in-court/cases/perry-v-schwarzenegger.html> (last visited Apr. 25, 2012).

33. See Jesse McKinley, *Bush v. Gore Foes Join to Fight California Gay Marriage Ban*, N.Y. TIMES, May 28, 2009, at A1; Jesse McKinley, *Fight to Reverse California's Same-Sex Marriage Ban Heads to Courtroom*, N.Y. TIMES, Jan. 11, 2010, at A9. For examples of coverage of the lower court's decision in *Perry*, see *supra* note 1 and accompanying text.

34. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 991 (N.D. Cal. 2010).

35. For predictions to this effect, see, for example, Devin Dwyer, *Unconstitutional: Federal Court Overturns Proposition 8, Gay Marriage Ban in California*, ABC NEWS (Aug. 4, 2010), http://abcnews.go.com/Politics/california-gay-marriage-ruling-due-appeal-expected/story?id=11322255#.T3G_-mEgeEY.

36. See Eskridge & Spedale, *supra* note 1.

have been equally vocal in questioning the wisdom of those pursuing the *Perry* litigation. In a joint memo signed by nine organizations, including Lambda Legal, the Human Rights Campaign, and the American Civil Liberties Union (ACLU), advocates sympathetic to the cause predicted that popular backlash might lead to defeat in the Supreme Court.³⁷ As the joint memo explained, “There is a very significant chance that if we go to the Supreme Court and lose, the Court will say that discrimination against LGBT people is fairly easy to justify.”³⁸ At the same time, Jennifer Pizer, the Lambda attorney who argued *Perry* at the state level, stressed the unique dangers of backlash tied to federal litigation.³⁹

Similar concerns about backlash have surrounded the decision to litigate *Gill*.⁴⁰ Brought by Mary Bonauto and GLAD, *Gill* and its companion case, *Commonwealth of Massachusetts v. Department of Health and Human Services*,⁴¹ present several challenges to Section three of the federal Defense of Marriage Act, which denied a host of federal benefits to married same-sex couples.⁴² In July 2010, Judge Joseph Tauro of the Massachusetts District Court ruled in GLAD’s favor, holding that Section three violated the Due Process Clause of the Fifth Amendment and, in *Department of Health and Human Services*, that it also violated the Tenth Amendment provisions on state authority.⁴³ Even some supportive of the same-sex marriage cause have suggested that *Gill* will do the movement more harm than good. For example, Jack Balkin has argued that if the Supreme Court upholds the ruling in *Gill* on appeal or even denies certiorari—in effect, permitting the same result—the Court would “spark an equally big political backlash.”⁴⁴

Many of the criticisms of the litigation strategy like the ones pursued in *Perry* and *Gill* rely on a particular historical narrative about the impact of past same-sex marriage decisions. According to this narrative, litigation primarily has undermined the same-sex marriage cause.⁴⁵ Victories in cases like *Baehr v. Lewin*, *Baker*, and

37. See Arana, *supra* note 3.

38. *Id.*

39. *Id.*

40. 699 F. Supp. 2d 374 (D. Mass. 2010).

41. For the initial memorandum filed in this case, see Memorandum, *Massachusetts v. Dep’t of Health & Human Servs.*, 698 F. Supp. 2d 234 (D. Mass. 2010).

42. *Massachusetts v. Dep’t of Health & Human Servs.*, 698 F. Supp. 2d 234, 235-36 (D. Mass. 2010).

43. *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 377 (D. Mass. 2010); *Dep’t of Health & Human Servs.*, 698 F. Supp. 2d at 236.

44. Jack M. Balkin, *How Things Might Turn Out Well in the DOMA Cases*, BALKINIZATION (July 13, 2010, 1:50 PM), <http://balkin.blogspot.com/2010/07/how-things-might-turn-out-well-in-doma.html>.

45. See, e.g., ROSENBERG, *supra* note 6, at 415-16.

Goodridge increased opposition to same-sex marriage.⁴⁶ Socially conservative groups like the Family Research Council and Focus on the Family mobilized to oppose the decisions.⁴⁷ Partly because of these activists, a wave of measures opposing same-sex marriage appeared, including state constitutional bans.⁴⁸ Relying on this history, critics in the same-sex marriage movement and the academy caution against the use of litigation both in cases like *Perry* and *Gill* and in the future.

However, the historical account on which these critics rely is incomplete. As we shall see, decisions like *Baker* and *Goodridge* not only produced backlash but also influenced the terms of the debate about same-sex marriage and the coalitions participating in it in a way that may have advanced the same-sex marriage cause. It is difficult to establish whether these shifts will necessarily benefit the same-sex marriage movement in the long term; however, the history considered here will show that the past effects of same-sex marriage litigation have been more complex and less well understood than many current studies suggest. Criticisms of the decision to litigate cases like *Perry* and *Gill* are at best premature. Past decisions like *Baker* and *Goodridge* should be judged by their true impact, not by an incomplete and unduly negative historical narrative. With a better understanding of the past, we may see that the litigation of cases like *Baker* and *Goodridge*—and current cases like *Perry* and *Gill*—were more beneficial for the same-sex marriage movement than we may now realize.

III. THE SAME-SEX MARRIAGE QUESTION: 1970-1993

As George Chauncey has convincingly shown, the first legal demands for same-sex marriage long predated the litigation of *Baehr v. Lewin* in the early 1990s.⁴⁹ For example, in the 1970s, same-sex couples in Minnesota and Los Angeles brought constitutional test cases that received national press attention.⁵⁰ Nonetheless, as we shall see, same-sex marriage was mostly a marginal issue for the mainstream gay rights movement before the 1993 *Baehr* decision. In this regard, *Baehr* may have benefitted the same-sex marriage cause by dramatically increasing awareness of the issue, both in the gay rights movement and in the broader society.

46. See, e.g., D'Emilio, *supra* note 5, at 59-61.

47. See, e.g., Klarman, *supra* note 8, at 459-60, 466-68.

48. See, e.g., ROSENBERG, *supra* note 6, at 356-64.

49. GEORGE CHAUNCEY, WHY MARRIAGE? THE HISTORY SHAPING TODAY'S DEBATE OVER GAY EQUALITY 78, 89-92 (2004).

50. See *Court Won't Let Men Wed*, N.Y. TIMES, Jan. 10, 1971, at 65; Myrna Oliver, *Gay Couple Can't Wed*, L.A. TIMES, Mar. 16, 1977, at D6.

A. *Before Baehr: 1970-1993*

When same-sex marriage first emerged as an issue, it was not tied to major gay liberation organizations but instead to the Metropolitan Community Church, founded in 1969 in Los Angeles by the Reverend Troy Perry.⁵¹ The church's stated mission involved the provision of spiritual sanctuary and guidance to openly gay men and women who had been turned away from mainstream churches.⁵² Originally, when Reverend Perry celebrated twenty-eight commitment ceremonies in 1970, church leaders described the ceremonies in religious, rather than political, terms.⁵³ In February of 1970, Reverend Perry explained that gay couples had spiritual reasons for seeking marriage and "settling down like anyone else."⁵⁴ The term often used to describe the relationship celebrated by the Church, "holy unions," also made apparent the religious dimension of the Church's ceremonies.⁵⁵ By the summer of 1970, however, some couples, including those involved with the Church, began seeking legal recognition of their relationships.⁵⁶

Between 1970 and 1971, a number of prominent test cases drew on the church's efforts to legalize same-sex unions but did so in exclusively secular and legal terms. The most famous test case, *Baker v. Nelson*,⁵⁷ brought by University of Minnesota students Richard Baker and James McConnell, had no link to the church's religious rhetoric. Baker and McConnell focused instead on rights to privacy, freedom of association, and freedom from cruel and unusual punishment involved in barring access to marriage.⁵⁸

Like Baker and McConnell's ultimately unsuccessful litigation, many of the early test cases were brought without contact with the church and without major organizational support. For example, when a Boulder, Colorado, county clerk performed six gay weddings in 1975, the *New York Times* reported no link to the church or to any other major group.⁵⁹ It was only in the spring of 1977 that test cases

51. See Edward B. Fiske, *Homosexuals in Los Angeles, Like Many Elsewhere, Want Religion and Establish Their Own Church*, N.Y. TIMES, Feb. 15, 1970, at 58.

52. See *A Church for Homosexuals*, CHI. TRIB., June 7, 1970, at G84.

53. *Id.*

54. See Fiske, *supra* note 51.

55. See Nancy Nappo, *A Church for Homosexuals: Princeton Congregation Rents Space in Unitarian Church*, N.Y. TIMES, Oct. 23, 1977, at NJ3 (offering an example of the use of the term "holy union" by members of the Metropolitan Community Church); see also Ellen Lewin, *Commitment Ceremonies*, in *HOMOSEXUALITY AND RELIGION: AN ENCYCLOPEDIA* 99, 100 (Jeffrey S. Siker ed., 2007) (same).

56. WILLIAM N. ESKRIDGE, JR. & DARREN R. SPEDALE, *GAY MARRIAGE: FOR BETTER OR WORSE? WHAT WE'VE LEARNED FROM THE EVIDENCE* 16 (2006).

57. 191 N.W.2d 185 (Minn. 1971).

58. For a summary of Baker and McConnell's arguments, see *id.*

59. Grace Lichtenstein, *Homosexual Weddings Stir Controversy in Colorado*, N.Y. TIMES, Apr. 27, 1975, at 49.

drew on the religious rhetoric used by the church. In March of that year, for example, Reverend Mikhail Itkin—the prior of the Community of the Love of Christ, a similar organization—brought a test case on behalf of himself and his partner that invoked, among other things, the First Amendment’s Free Exercise Clause.⁶⁰

For the most part, however, even test cases like Itkin’s disappeared from the gay rights legal reform agenda between 1978 and 1990. There were several reasons for this development. First and most obviously, the test cases brought between 1970 and 1977 had been uniformly unsuccessful and offered little encouragement to activists interested in legalizing gay marriage. The relative success of *Baker v. Nelson*,⁶¹ the case that advanced the furthest in the courts, is illustrative of the generally dismal results that activists encountered: the Minnesota Supreme Court did not reject Baker and McConnell’s privacy and sex discrimination claims out of hand, but rather analyzed their arguments before ultimately rejecting them.⁶²

As importantly, inspired by the Stonewall Riot of 1969, major radical gay rights organizations like the Gay Liberation Front and the Gay Activists’ Alliance viewed marriage reform as unimportant, if not dangerously conformist. For example, the Gay Liberation Front protested not only in favor of homosexual rights but also against the institution of marriage.⁶³ As Michael Brown, a member of the Gay Liberation Front, explained to the *New York Times* in August 1970, “We’re not oriented toward acceptance but toward changing every institution in the country—male domination, capitalist exploitation, all the rest of it.”⁶⁴

Moreover, between 1975 and 1979, as part of the Equal Rights Amendment (ERA) campaign, women’s organizations that might have been sympathetic to demands for same-sex marriage began to distance themselves from the issue. By July 1975, discussion of same-sex marriage had become a central tactic of Phyllis Schlafly’s S.T.O.P. E.R.A. and other major organizations opposed to the Amendment. As Schlafly wrote in a July 1975 edition of *The Phyllis Schlafly Report*, the “ERA [would] legalize homosexual marriages and give homosexuals and lesbians all the rights of husbands and wives such as the right to file joint income tax returns, to adopt children, to teach in the schools, etc.”⁶⁵ Between 1974 and 1976, the ho-

60. See Oliver, *supra* note 50.

61. 191 N.W.2d 185 (Minn. 1971).

62. See *id.*

63. See, e.g., DUDLEY CLENDINEN & ADAM NAGOURNEY, OUT FOR GOOD: THE STRUGGLE TO BUILD A GAY RIGHTS MOVEMENT IN AMERICA 38 (1999).

64. Steven V. Roberts, *Homosexuals in Revolt*, N.Y. TIMES, Aug. 24, 1970, at 28.

65. Phyllis Schlafly, *The Hypocrisy of ERA Proponents*, THE PHYLLIS SCHLAFLY REPORT (The Eagle Trust Fund, Alton, Ill.), July 1975, at 3, in *The Phyllis Schlafly Report Collection* (on file with Harvard University).

mosexual marriage argument against the ERA continued to play a central role in state-level campaigns like the one against the State Equal Rights Amendment in New York and another against the ratification of the federal ERA in Georgia.⁶⁶

During the 1975 campaign in New York, even ERA proponents began distancing themselves from homosexual-rights claims. Sandra Turner, the executive director of the New York Equal Rights Coalition, said of opposition arguments, “None of the scare tactic things they say will happen—such as legalizing homosexual marriages.”⁶⁷ By 1977, after President Carter announced and funded a national conference in honor of International Women’s Year (IWY), feminist members of the Oversight Committee for IWY supported “lesbian rights” in the abstract but clearly stated that the ERA would not “require [s]tates to permit homosexual marriages.”⁶⁸

During the period between 1977 and 1990, gay rights activists also saw little reason to make same-sex marriage a great priority. One reason for the movement’s inattention to the issue was the outbreak of the AIDS epidemic, which made marriage seem of marginal importance. By 1987, organizations like the National Gay and Lesbian Task Force (NGLTF) and the Human Rights Campaign reported to the *New York Times* that AIDS had “increased the level of gay participation in American politics by a tremendous amount.”⁶⁹

However, as the *New York Times* reported, “energy and resources of gay groups [were] diverted from basic rights issues,” such as those for marriage, sodomy ban repeals, or the introduction of antidiscrimination ordinances, as more time was devoted “toward efforts for more funds for AIDS treatment and research and to protect infected people from discrimination.”⁷⁰ At the same time, between 1985 and 1987, in states like New York and California, the publicity surrounding the AIDS crisis prompted an anti-gay backlash, even against reforms considered to be more mainstream than same-sex marriage, including the repeal of sodomy bans, as opponents of gay rights cited public

66. See Robin Morris, *Organizing Breadmakers: Kathryn Dunaway’s ERA Battle and the Roots of Georgia’s Republican Revolution*, in *ENTERING THE FRAY: GENDER, POLITICS, AND CULTURE IN THE NEW SOUTH* 161, 161-64 (Jonathan Daniel Wells & Sheila R. Phipps eds., 2010); Judy Klemesrud, *As New York Vote on Equal Rights Nears, Two Sides Speak Out*, N.Y. TIMES, Sept. 18, 1975, at 46.

67. See Klemesrud, *supra* note 66.

68. National Commission on the Observance of International Women’s Year, *The Spirit of Houston: The First National Women’s Conference, An Official Report to the President, The Congress and the People of the United States* 51 (1978). See also Megan Rosenfeld & Bill Curry, *Women’s Conference Passes Abortion, Gay Rights Measures*, WASH. POST, Nov. 21, 1977, at A1.

69. Thomas Morgan, *Amid AIDS, Gay Movement Grows but Shifts*, N.Y. TIMES, Oct. 10, 1987, at 1.

70. *Id.*

health as well as religious reasons for criminalizing gay sex.⁷¹ As George Chauncey argued, the AIDS crisis helped to highlight legal needs in the gay and lesbian community that could be met through legalized marriage, especially those involving intestacy rules, adoption, survivors' benefits, and Social Security.⁷² In the 1980s, however, the AIDS struggle made a campaign for same-sex marriage seem less urgent and less politically feasible.

The Supreme Court's 1986 decision in *Bowers v. Hardwick*⁷³ also helped to make marriage a less central priority in the gay rights legal reform agenda. *Bowers* rejected a constitutional challenge to a Georgia law criminalizing homosexual sodomy.⁷⁴ The decision reoriented the reform agenda of major gay rights organizations in several ways. First, the decision focused new attention on the need to repeal criminal sodomy bans. The NGLTF founded the Privacy Project, an initiative focused on campaigning against *Bowers* and the sodomy bans that remained on the books in twenty-five states and the District of Columbia.⁷⁵ In speaking out against *Bowers*, members of groups like the NGLTF also emphasized the link between sodomy bans and the denial of other rights to which gays or lesbians should be entitled.⁷⁶

In the aftermath of *Bowers*, groups like the NGLTF and Lambda Legal pursued a two-pronged strategy: challenging sodomy bans while also pursuing municipal or statewide laws prohibiting discrimination in employment, housing, or public accommodations. Organizers like Nan Hunter of the ACLU embraced this approach, and Sue Hyde of the NGLTF explained, "[I]t [was] not wise to have sodomy law repeal as the first goal [for a statewide group]. . . . [L]ocal or statewide civil rights protection laws and hate crimes legislation [were] easier to fight for."⁷⁷ Hyde's prediction proved to be correct: whereas only Wisconsin and the District of Columbia prohibited sexual orientation discrimination when *Bowers* was decided, several other states had done so by 1993, including Massachusetts, Connecticut, New Jersey, Vermont, and Rhode Island.⁷⁸ In the struggle for

71. See *id.*; Clare Ansberry, *Fear and Loathing: AIDS, Stirring Panic and Prejudice, Tests the Nation's Character*, WALL ST. J., Nov. 13, 1987, at 1.

72. See CHAUNCEY, *supra* note 49, at 96-111.

73. 478 U.S. 186 (1986).

74. *Id.* at 190-96.

75. See, e.g., Ruth Marcus, *Sodomy Ruling's Implications Extend Far Beyond Bedroom*, WASH. POST, July 2, 1986, at A1; Jay Mathews, *Antisodomy Laws Targeted for Repeal After High Court Ruling*, WASH. POST, Feb. 4, 1987, at A16; Jennie McKnight, *Keeping Sodomy on the (Political) Agenda*, GAY COMMUNITY NEWS, July 16-22, 1989, at 16.

76. See McKnight, *supra* note 75.

77. *Id.* For an overview of the campaign against criminal sodomy bans, see generally WILLIAM N. ESKRIDGE, JR., *DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA 1861-2003* (2008).

78. National Gay and Lesbian Task Force, *State Non-Discrimination Laws in the U.S.* (Jan. 20, 2012), available at http://www.thetaskforce.org/downloads/reports/issue_maps/non_discrimination_1_12.pdf (last visited Apr. 25, 2012).

sodomy repeal and antidiscrimination legislation, marriage seemed to be a secondary priority.

B. Baehr: The Birth of a National Issue

As a whole, national gay rights organizations continued to deemphasize same-sex marriage as a legal reform goal between 1990 and 1994. For example, when Ninia Baehr and Genora Dancel, Joseph Melillo and Patrick Lagon, and Tammy Rodrigues and Antoinette Pregil challenged the decision to deny them marriage licenses in the early stages of the *Baehr* litigation, the ACLU and the Lambda Legal Defense and Education Fund turned away the couples' requests for assistance.⁷⁹ ACLU attorneys later cited "serious strategic questions," including a fear of backlash, as justification for the organization's refusal to take the case.⁸⁰

Baehr helped to increase the prominence of the same-sex marriage issue within national gay rights organizations and in state and national debates. However, backlash accompanying the rising prominence of the same-sex marriage issue is well known. In 1996, partly because of fear that the Full Faith and Credit Clause would require other states to recognize same-sex marriages celebrated in Hawaii, Congress passed a federal Defense of Marriage Act (DOMA), and several states passed similar measures.⁸¹ Nonetheless, *Baehr* also helped to make same-sex marriage an organizational priority for both gay rights groups and their opponents.

Indeed, in July 1995, a coalition of prominent national gay rights groups, calling themselves the Freedom to Marry Coalition, were willing to endorse the cause publicly and met in order to discuss how best to frame the issue.⁸²

Similarly, Human Rights Campaign leaders first spoke out about same-sex marriage in the spring of 1996, after the Defense of Marriage Act was introduced in response to *Baehr*. However, while working to prevent then-President Clinton from supporting DOMA, the Human Rights Campaign did not argue that same-sex marriage was

79. Paul M. Barrett, *I Do/No You Don't: How Hawaii Became Ground Zero in Battle Over Gay Marriages*, WALL ST. J., June 17, 1996, at A1.

80. *Id.*

81. As enacted in 1996, section two of DOMA explicitly addressed the full-faith-and-credit argument. Defense of Marriage Act, H.R. Res. 3396, 104th Cong. (1996) (enacted).

82. See, e.g., Freedom to Marry Coalition Meeting Agenda and Notes (July 24, 1995), in The Human Sexuality Archive, Division of Rare and Manuscript Collections (on file with Cornell University); Letter from Evan Wolfson to Rob Banaszak (July 20, 1995), in The Human Sexuality Archive, Division of Rare and Manuscript Collections (on file with Cornell University).

constitutionally necessary or socially desirable.⁸³ At first, leaders of the organization spoke only about the motivations and sincerity of those sponsoring DOMA.⁸⁴ In May 1996, for example, Human Rights Campaign member Daniel Zingale told the *San Francisco Chronicle* that DOMA supporters had a “clear political motive” since no state had seriously considered permitting same-sex couples to marry.⁸⁵ Nonetheless, whether Campaign members spoke about same-sex marriage as an issue of “gratuitous gay-bashing” or otherwise, *Baehr* made the issue of same-sex marriage a more prominent one for the organization.⁸⁶

Baehr also helped to make same-sex marriage a more significant issue for evangelical and New Right organizations. Before the *Baehr* decision and to take advantage of the election of a conservative, “family values” majority in Congress, evangelical organizations like Focus on the Family, the Family Research Council, and the Traditional Values Coalition focused not on same-sex marriage but on the passage of a “Religious Equality Amendment” to the Federal Constitution, a measure that would legalize school prayer and overrule Supreme Court decisions to the contrary.⁸⁷ After *Baehr*, New Right groups committed significant resources and time to the passage of a Federal Defense of Marriage Act. By November 1999, Reverend James Dobson of Focus on the Family described same-sex marriage as the greatest threat to family values.⁸⁸

Baehr succeeded in drawing public attention and organizational interest to the issue of same-sex marriage and, in doing so, potentially benefitted the same-sex marriage movement. However, as we shall see, the effects of two later same-sex marriage decisions, *Baker* and *Goodridge*, were more complex. These decisions helped to reshape the argumentative strategies of major organizations on either side of the debate.

83. See, e.g., Joseph Hanania, *The Debate Over Gay Marriages: No Unity*, L.A. TIMES, June 13, 1996, at E1; Laura Meckler, *Clinton Says He'd Sign Ban on Gay Marriages*, PITTSBURGH POST-GAZETTE, May 23, 1996, at A13.

84. Carolyn Lochhead, *GOP Bill Targets Same-Sex Marriages: Measure Would Affect Benefits, Recognition*, S.F. CHRON., May 9, 1996, at A1 (reporting early Human Rights Campaign commentary on same-sex marriage).

85. *Id.*

86. See, e.g., Barbara Vobejda, *Same-Sex Marriage Becomes Political Issue: Gay-Rights Advocates Protest White House Backing of Federal Ban*, WASH. POST, May 23, 1996, at A14.

87. See Gustav Niebuhr, *The Religious Right Readies Agenda for Second 100 Days*, N.Y. TIMES, May 16, 1995, at A1. As Reverend Louis Sheldon of the Traditional Values Coalition explained, many evangelicals’ “main thrust [was] going to be the Religious Equality Amendment.” *Id.*

88. See Josephine Ross, *The Sexualization of Difference: A Comparison of Mixed-Race and Same-Gender Marriage*, 37 HARV. C.R.-C.L. L. REV. 255, 264 (2002) (quoting Dobson) (“If same sex marriage becomes lawful . . . marriage will be finished.”).

IV. THE TERMS OF THE DISCUSSION

The major argumentative strategies used by national organizations on either side of the same-sex marriage battle looked very different in 2004 than they did in 1999.⁸⁹ Citing recent decisions by the Vermont Supreme Court and the Massachusetts Supreme Judicial Court, proponents downplayed privacy-based claims or arguments featuring the traditional importance of marriage, instead emphasizing arguments about the rights of gay and lesbian couples to equal treatment. For their part, after the decision of *Goodridge* in 2003, same-sex marriage opponents like the Family Research Council began deemphasizing arguments that homosexuality should never be socially acceptable and would necessarily undermine straight marriage. Instead, these organizations echoed *Goodridge*'s emphasis on civil rights and equal treatment as support for their own claims of religious liberty. Opposition to same-sex marriage was reframed as an exercise of the very civil rights of which the *Goodridge* Court spoke.

At least at this point in the same-sex marriage struggle, it is impossible to assess which side will benefit in the long term from the changes in argumentative strategies studied here. At the same time, however, scholars portraying the history of same-sex marriage litigation in purely negative terms have done so prematurely and potentially incorrectly. These decisions proved to be powerful tools for same-sex marriage advocates working to reshape the terms of discussion and the alliances that shaped it. By missing the effects of these judicial decisions on the terms of the same-sex marriage debate, scholars have looked at only part of the story. With a fuller understanding of the past, we may see that the litigation of cases like *Baker* and *Goodridge*, or even *Perry* and *Gill*, was more beneficial than some leading analyses suggest.

89. It is worth noting that, in the early stages of the struggle for same-sex marriage, grassroots and regional organizations led the campaigns in Hawaii and Vermont. Significantly, in the lead-up to *Baker*, Beth Robinson and Susan Murray of the Vermont Freedom to Marry Coalition, a grassroots lobbying and litigation unit, and Mary Bonauto of GLAD, a regional litigation group, championed equality-based arguments that had been rejected by national gay rights groups. At a press conference in November 1998, Bonauto explained that *Baker* was "about what . . . Vermont's guarantees of equality mean for Vermont citizens." See Mary Ziegler, *Framing Change: Cause Lawyering, Constitutional Decisions, and Social Change*, 94 MARQ. L. REV. 263, 300 (2010) (quoting *Gay Marriage Debate Set in Vermont Court*, SACRAMENTO BEE, Nov. 18, 1998, at A5). At a Vermont Freedom to Marry rally the following February, Deborah Lashman, a prominent member of Vermont Freedom to Marry, reaffirmed this rhetorical strategy, explaining that the issue was whether the Vermont Constitution allowed "the Legislature to single out a class of families for adverse treatment." Press Release, Vermont Freedom to Marry Task Force, Civil Rights Group Denounces Discriminatory Bill (Feb. 1999) (on file with the author).

A. *The Freedom to Marry Coalition*

In the mid-1990s, the Freedom to Marry Coalition members, which are now known as Marriage Equality U.S.A. and Freedom to Marry, grew out of informal meetings on marriage strategy called by Lambda Legal and joined by several other gay rights organizations.⁹⁰ By July 1995, the organizations formally called themselves the Freedom to Marry Coalition and set out to develop a coherent rhetorical strategy.⁹¹ Coalition members first considered whether to use equal protection arguments like those advanced in the campaign against “anti-special-treatment” laws, measures prohibiting antidiscrimination protections for gays and lesbians.⁹² After California Governor Pete Wilson vetoed an anti-sexual-orientation discrimination bill in 1991,⁹³ a number of states began introducing “anti-special-treatment” legislation, including Colorado’s Amendment 2, which would ultimately be challenged in 1996 in *Romer v. Evans*.⁹⁴

The Coalition’s polling data indicated that a majority of Americans believed that same-sex marriage was “not a civil rights issue.”⁹⁵ Instead of connecting the same-sex marriage movement to the movement for civil rights, Coalition members were asked to describe marriage as a “[b]asic human right,” something that same-sex couples “already ha[d]” that was “being taken away.”⁹⁶ In 1996, the Human Rights Campaign issued “talking points” for debaters that reflected this emphasis.⁹⁷ In focusing on similar concerns, the Coalition created a Marriage Resolution, stating that “[b]ecause marriage is a basic

90. See *supra* note 82 and accompanying text. For a sample of the early press statements made by members of the Freedom to Marry Coalition, see, for example, Frank J. Murray, *Lambda Project Presses Issue*, WASH. TIMES, Oct. 30, 1994, at A4; Nora Villagran, *State of Matrimony Refusing to Alter Plans of Commitment, Same-Gender Couples Wed While Awaiting the Day Such Unions Get a Legal Blessing*, SAN JOSE MERCURY NEWS, Aug. 6, 1995, at 1H. On the current operations of Freedom to Marry, see, for example, *About Freedom to Marry*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/pages/about-us> (last visited Apr. 25, 2012). On the current operations of Marriage Equality U.S.A., see, for example, *About MEUSA*, MARRIAGE EQUALITY, <http://www.marriageequality.org/about-meusa> (last visited Apr. 25, 2012).

91. See *supra* note 82 and accompanying text.

92. For discussion of other examples of other anti-special treatment laws, see *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987) and *Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 54 F.3d 261, 267 (6th Cir. 1995).

93. Leef Smith, *Gay Rights Demonstrators Decry California Veto; 4,000 Rally at State Capitol Governor Says Existing Laws Protect Against Discrimination*, WASH. POST, Oct. 12, 1991, at A13.

94. Timothy Egan, *Anti-Gay Backlashes Are on 3 States' Ballots*, N.Y. TIMES, Oct. 4, 1992, at 4; see also *Romer v. Evans*, 517 U.S. 620, 635 (1996) (striking down Colorado’s Amendment 2 on equal-protection grounds).

95. See Freedom to Marry Coalition Meeting Agenda and Notes, *supra* note 82.

96. See *id.*

97. Human Rights Campaign, *Talking Points* (Jan. 31, 1996), in *The National Gay and Lesbian Task Force Collection Papers*, Human Sexuality Archive, Division of Rare and Manuscript Collections (on file with Cornell University).

human right and an individual personal choice, . . . the State should not interfere with same-gender couples who choose to marry.”⁹⁸

The Coalition’s insistence on rights-based arguments affected which alliances the organization pursued. This was apparent when Coalition leaders called another meeting in October 1995 to discuss with which organizations or individual leaders the Coalition could form alliances.⁹⁹ Coalition leaders named a number of possible constituencies to whom rights-based arguments might appeal, including “unions, women’s groups, people of color groups, religious groups,” progressive civil rights groups, celebrities, and corporations “with non-discrimination policies.”¹⁰⁰

After Republican Senators first presented the federal Defense of Marriage Act in May 1996,¹⁰¹ the Coalition continued relying primarily on rights-based arguments in campaigning for same-sex marriage. For example, Parents, Families, and Friends of Lesbians and Gays (PFLAG), one of the organizations belonging to the Coalition, sent out an alert about the Defense of Marriage Act, arguing that “[m]arriage [was] a basic human right” and that “[t]he decision of whom to marry [was] a deeply personal one that should not be interfered with [by] the federal government.”¹⁰²

Between 1997 and the winter of 1999, the Coalition continued relying primarily on rights-based arguments in campaigning for same-sex marriage. These efforts still centered on the Marriage Resolution, as did the Coalition’s strategy of building alliances with religious organizations or civil rights groups willing to sign it.¹⁰³ When the Coalition did make equality-based legal arguments, those claims did not directly involve sexual orientation. On National Freedom to Marry Day in 1998, for example, Evan Wolfson, one of the Coalition leaders, did not stress equality-based claims but reiterated that “[t]he choice

98. See Freedom to Marry Coalition Meeting Agenda and Notes, *supra* note 82. For the full text of the Marriage Resolution, see *Lambda Urges Religious Leaders to Support Marriage Equality for Same-Sex Couples*, LAMBDA LEGAL (Aug. 13, 1998), http://www.lambdalegal.org/news/ny_19980813_lambda-urges-religious-leaders-to-support-marriage-equality.

99. See Memorandum from Evan Wolfson to the Steering Comm. of the Nat’l Freedom to Marry Coal. (Oct. 16, 1995), in The National Gay and Lesbian Task Force Collection, The Human Sexuality Archive, Division of Rare and Manuscript Collections (on file with Cornell University).

100. See *id.*

101. See Cassandra Burrell, *GOP Bill Would Bar Same-Sex Marriages*, HOUS. CHRON., May 8, 1996, at A9.

102. PFLAG Public Education Committee, DOMA Action Alert (May 10, 1996), in The PFLAG Papers, The Human Sexuality Archive, Division of Rare and Manuscript Collections (on file with Cornell University).

103. See *Lambda Urges Religious Leaders to Support Marriage Equality for Same-Sex Couples*, *supra* note 98.

of whether and whom to marry [was] one of the most important personal decisions there is.”¹⁰⁴

In litigating *Baker*, GLAD, a key member of the Coalition, also stressed that marriage was a “fundamental right” tied to the “profound mutual love, respect, commitment, and intimacy . . . essential for human dignity.”¹⁰⁵ The *Baker* reply brief focused on the ways in which marriage was a fundamental right, emphasizing its expressive functions and the social status it enjoyed.¹⁰⁶ To the extent that GLAD touched on equality interests, the brief argued only that existing marriage laws involved constitutionally impermissible “sex-based classifications,” premised on gender stereotypes.¹⁰⁷ The brief did not explicitly address discrimination on the basis of sexual orientation nor did it discuss at length the effects of existing marriage laws on same-sex couples.¹⁰⁸

The *Baker* decision in the winter of 1999 created a valuable opportunity for those in the organization seeking to emphasize different arguments. After rejecting a claim that Vermont’s existing marriage statute provided for gay marriage, the *Baker* majority surveyed Vermont precedent on the Common Benefits Clause of the Vermont Constitution, an analysis not directly tied to the suspect-class jurisprudence decided under the federal Equal Protection Clause.¹⁰⁹ Relying on the text and history of the Common Benefits Clause, and without specifying a remedy, the majority held that same-sex couples were “entitled under Chapter I, Article 7, of the Vermont Constitution to obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples.”¹¹⁰

Of course, *Baker* touched on rights- as well as equality-based arguments. The decision discussed the cultural significance of marriage and stressed its “public benefits and protections.”¹¹¹ But the decision emphasized equal protection doctrine and equality-based rhetoric.

In doing so, *Baker* became an important new tool for the Coalition, legitimating and highlighting equality-based arguments explicitly linked to the decision itself. In early press releases following the decision, for example, Lambda leaders made no mention of the Marriage

104. Press Release, Lambda Legal, National Freedom to Marry Day -- February 12 (Jan. 12, 1998), available at http://www.lambdalegal.org/news/ny_19980112_national-freedom-to-marry-day.

105. See Reply Brief for Appellants at 5, *Baker v. State*, 744 A.2d 864 (Vt. 1999) (No. 98-32), in *The Human Rights Campaign Papers*, Division of Rare and Manuscript Collections (on file with Cornell University).

106. *Id.* at 1, 4-5, 12.

107. *Id.* at 13.

108. See *id.*

109. *Baker v. State*, 744 A.2d 864, 869-73 (Vt. 1999).

110. *Id.* at 886.

111. *Id.* at 883.

Resolution,¹¹² instead quoting extensively from the *Baker* opinion and labeling it as a sign that “Americans are recognizing that it is time to end this discrimination” against same-sex couples.¹¹³ When the Coalition held another National Freedom to Marry Day in February of 2000, the event also highlighted *Baker* and its equal protection arguments for same-sex marriage.¹¹⁴ Lambda members explained to the press that the message sent by *Baker* was that “gay couples and our families need the same protections and opportunities as non-gay couples.”¹¹⁵ Matthew Roberts, a regional director of Lambda, similarly argued that the decision sent a “resounding message of equality.”¹¹⁶

Even after Vermont passed a civil union law rather than allowing same-sex marriage,¹¹⁷ Coalition members emphasized equal protection arguments drawn from *Baker* in advocating same-sex marriage. During the 2001 celebration of National Freedom to Marry Day, Ruth Harlow of Lambda borrowed the language of the *Baker* majority in arguing that the celebration signified “a desire for all couples to be treated equally by law—nothing more, and nothing less.”¹¹⁸ In the same year, Evan Wolfson of the Coalition similarly explained that, in *Baker*, the gay rights movement had “show[n] that there [was] no good reason for sex discrimination in civil marriage, just as there was no good reason for race discrimination in civil marriage a generation ago.”¹¹⁹

During the lead-up to oral argument in *Lawrence v. Texas*¹²⁰ in the spring of 2003, however, there was some disagreement within the Coalition as to how best to present the petitioners’ case before the Supreme Court. *Lawrence* involved a constitutional challenge to a

112. It is worth noting that a similar (although differently worded) Marriage Pledge is still used as an advocacy tool by Freedom to Marry. See *Take the Pledge*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/page/s/pledge> (last visited Apr. 25, 2012). For the original language of the resolution, see *Voice for Equality: Bea Arthur*, FREEDOM TO MARRY (Jan. 06, 2010, 10:00 AM), <http://www.freedomtomarry.org/blog/entry/voice-for-equality-bea-arthur>.

113. See, e.g., Press Release, Lambda Legal, In Dramatic First, Vermont High Court Orders State to Treat Gay & Non-Gay Couples Equally (Dec. 20, 1999), http://www.lambdalegal.org/news/ny_19991220_dramatic-first-vt-high-court-orders-state-treat-gay-nongay-couples-equally.

114. See Press Release, Lambda Legal, Third Annual Freedom to Marry Day in Cities Nationwide (Feb. 8, 2000), http://www.lambdalegal.org/news/ny_20000208_third-annual-natl-freedom-to-marry-day.

115. See *id.*

116. See *id.*

117. For coverage of the controversy surrounding passage of the civil-union bill, see John Gallagher, *Separate But Equal: All Eyes Turn to the Vermont Legislature as It Wrestles With a Landmark Court Ruling Regarding Gay Couples*, ADVOC., Feb. 1, 2000, at 28.

118. See Press Release, Lambda Legal, Gay Couples, Clergy, Politicians Join for National Freedom to Marry Day (Feb. 7, 2001), http://www.lambdalegal.org/news/ny_20010207_gay-couples-clergy-politicians-join-natl-freedom-to-marry-day.

119. Evan Wolfson, *All Together Now*, ADVOC., Sept. 11, 2001, at 34.

120. 539 U.S. 558 (2003).

Texas statute banning same-sex sodomy.¹²¹ In May 2003, prior to the decision of *Lawrence*, the need for persuasive arguments in favor of same-sex marriage grew when Republican Representative Marilyn Musgrave introduced a constitutional amendment that would prohibit same-sex marriage.¹²² Several members of the Coalition responded by keeping constitutional arguments about same-sex marriage out of the press.¹²³ Those who did make constitutional arguments, however, took a number of different approaches. For example, Wolfson, speaking on behalf of what was then called the Freedom to Marry Collaborative, argued that equal protection arguments would be the most effective.¹²⁴ By contrast, when Ruth Harlow of Lambda spoke to the press, she stressed that the petitioners in *Lawrence* were asking only for the government “to not have the police prosecute you for choosing one particular way to express your love for someone else in private.”¹²⁵ In trying to persuade the Court of their position, Coalition members, like the counsel for the petitioners, had reason to adopt a number of alternative arguments that might persuade the Court.¹²⁶

When *Lawrence* was decided, various commentators stressed that the analytical approach used in the case was hard to identify.¹²⁷ The Court relied, among other things, on historical evidence and prece-

121. *Id.* at 558-60.

122. *Frist Backs Putting Gay Marriage Ban in Constitution*, WASH. POST, June 30, 2003, at A2.

123. Beginning in 1995, members of the Coalition took this approach, recommending that only receptive members of Congress be approached about the same-sex marriage issue. See Memorandum from Evan Wolfson to the Steering Comm. of the Nat'l Freedom to Marry Coalition (Sept. 28, 1995), in *The PFLAG Papers*, The Human Sexuality Archive, Division of Rare and Manuscript Collections (on file with Cornell University).

124. Kristin Eliasberg, *Pride and Privacy as the Supreme Court Prepares to Hear a Landmark Gay-Rights Case*, *Advocates Debate Strategy*, BOSTON GLOBE, Mar. 2, 2003, at E1.

125. Warren Richey, *Court Test of Gay Rights vs. Traditional Values*, CHRISTIAN SCI. MONITOR, Mar. 25, 2003, at 2.

126. See Amicus Brief of the Human Rights Campaign et al., *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102). The briefs submitted in *Lawrence* similarly offered a variety of arguments. For example, the Cato Institute argued that the Texas sodomy statute challenged in *Lawrence* violated the Privileges and Immunities Clause of the Fourteenth Amendment. See Brief of the Cato Institute as Amicus Curiae in Support of Petitioners, at 27-30, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102). Similarly, the American Psychological Association argued, among other things, that homosexuality was normal and that the Texas law deprived gays of “fundamental aspects of human experience.” Brief for Amici Curiae American Psychological Association et al. in Support of Petitioners, at 3-22, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102).

127. See, e.g., Matthew Coles, *Lawrence v. Texas & the Refinement of Substantive Due Process*, 16 STAN. L. & POL'Y REV. 23, 27-31 (2005); Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63, 66 (2006) (arguing that *Lawrence* “compounded the problems of doctrinal clarity and judicial consistency” already plaguing substantive due process doctrine); Nelson Lund & John O. McGinnis, *Lawrence v. Texas and Judicial Hubris*, 102 MICH. L. REV. 1555, 1612 (2004) (arguing that substantive due process doctrine has “now culminated in the utter analytical confusion that is *Lawrence*, which offers no guidance at all for the future”).

dents decided abroad of “an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”¹²⁸ Explaining that the “[s]tate [could] not demean [the petitioners]’ existence or control their destiny by making their private sexual conduct a crime,” *Lawrence* implied that the petitioners’ “right to liberty” gave “them the full right to engage in their conduct without intervention of the government” but never set out a standard of review, explaining only that the statute challenged in *Lawrence* “further[ed] no legitimate state interest which [could] justify its intrusion into the personal and private life of the individual.”¹²⁹

Of course, it is possible to read *Lawrence* as recognizing that equality- and rights-based arguments are inextricably linked. However, in recognizing the close relationship between equality and liberty interests, the *Lawrence* Court could have framed subsequent debate in several ways. First, this framing could have been accomplished by using a clear, traditional doctrinal approach, such as the equal protection analysis suggested by Justice O’Connor in her concurring opinion in *Lawrence*.¹³⁰ Alternatively, as would be the case in *Goodridge*, the Court could have used or avoided equality rhetoric in describing the relationship between the constitutional interests. Unsurprisingly, because *Lawrence* used conflicting and sometimes novel rhetoric in striking down the Texas sodomy ban, members of the Coalition drew on it to expand their repertoire of claims.

For example, some Lambda members described *Lawrence* as both a privacy and an equal rights decision, arguing that “[n]on-gay Americans are coming to understand that excluding gay people from family protections such as access to healthcare . . . is wrong, just as including the police in our bedrooms is wrong.”¹³¹ In the summer immediately after *Lawrence* was decided, PFLAG members made similarly wide-ranging arguments in explaining their support for same-sex marriage.¹³² For example, one suggested that same-sex marriage was an issue of equal protection and equal dignity; another argued that marriage was a choice-based right like abortion; and yet another argued that marriage was an issue of privacy.¹³³ Because *Lawrence* was open-ended and because its doctrinal underpinnings were relatively

128. *Lawrence v. Texas*, 539 U.S. 558, 572 (2003).

129. *Id.* at 578.

130. *See id.* at 579-85 (O’Connor, J., concurring).

131. Evan Wolfson, *Liberty, Justice and Marriage for All*, FORWARD.COM (July 4, 2003), <http://www.forward.com/articles/7619/>.

132. *See, e.g.*, Readers’ and Members’ Comments on Gay Marriage, PFLAG Newsletter (Summer 2003), in *The PFLAG Papers*, The Human Sexuality Archive, Division of Rare and Manuscript Collections (on file with Cornell University).

133. *See id.*

obscure, the decision did not have the same effect on the arguments made by the Coalition that *Baker* had several years before.

The amicus brief joined by Freedom to Marry in *Goodridge* likewise characterized marriage as a constitutionally protected “intimate association,”¹³⁴ based on the “right of privacy”¹³⁵ and “the right of free expression.”¹³⁶ Instead of highlighting the interests of same-sex couples in equal treatment, the amicus brief identified the right to same-sex marriage as part of the line of cases explaining constitutional rights to freedom of speech or “liberty and privacy.”¹³⁷ In closing, the brief stated that marriage was a “unique expressive resource”¹³⁸ protected by state and federal “constitutional guarantees of free speech.”¹³⁹

After it was announced on November 18, 2003, the *Goodridge* decision provided an important opportunity for activists to reshape the arguments and coalitions stressed by the Coalition. Writing for a four-justice majority, Chief Justice Margaret Marshall explained that *Goodridge* was both an equal protection and due process decision.¹⁴⁰ Indeed, Marshall acknowledged that, for the purposes of same-sex marriage, “the two constitutional concepts . . . overlap[ped].”¹⁴¹ However, the *Goodridge* majority consistently stressed civil- and equal-rights rhetoric in describing the relationship between different constitutional protections.¹⁴² The court began by explaining “that civil marriage [had] long been termed a ‘civil right’ ” entitled to constitutional protection.¹⁴³ The court also stressed an analogy between *Goodridge* and anti-miscegenation-statute cases like *Loving v. Virginia*,¹⁴⁴ explaining that in both cases “a statute deprive[d] individuals of access to [the] institution of . . . marriage—because of a single trait: skin color in . . . *Loving*, sexual orientation here.”¹⁴⁵

After considering the three state interests offered to justify the exclusion of same-sex couples—the creation of an environment favorable to procreation, the guarantee of an optimal environment for child rearing, and the budgeting of limited financial resources—the

134. See Brief for Professors of Expression and Constitutional Law as Amici Curiae Supporting Plaintiffs-Appellants, at 1, 5, 23, 24, 25, 26, 27, 29, 30, 44, 48, 49, *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (No. SJC-08860).

135. *Id.* at 25.

136. *Id.* at 24, 29.

137. *Id.* at 25.

138. *Id.* at 49.

139. *Id.* at 47.

140. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 952 (Mass. 2003).

141. *Id.*

142. *Id.* at 957-58, 966.

143. *Id.* at 957.

144. 388 U.S. 1 (1967) (holding that Virginia’s ban on interracial marriage violated the Equal Protection and Due Process clauses).

145. *Goodridge*, 798 N.E.2d at 958.

Goodridge Court held that the statute could not survive rational basis review.¹⁴⁶ Although the court did not employ only traditional state equal protection analysis,¹⁴⁷ its decision was steeped in equality-based rhetoric, including an assertion that “[t]he history of constitutional law ‘is the story of the extension of constitutional rights and protections to people once ignored or excluded.’”¹⁴⁸

The Freedom to Marry Coalition used *Goodridge* as a chance to reshape its argumentative strategies and to pursue different types of alliances. The organization first considered the effect of *Goodridge* on its strategy in November 2003 at a staff meeting on civil marriage.¹⁴⁹ Some of the arguments emphasized at the meeting were drawn from *Goodridge* itself, including statements that “[m]arriage [was] not static [and had] evolved over time” and that marriage was “not solely for procreation even as currently constructed.”¹⁵⁰ However, more arguments drew on the civil rights and equality-based rhetoric used by the *Goodridge* Court.¹⁵¹ One staff member suggested stressing an analogy between the victories of the marriage equality movement and “[o]ther civil rights advances such as *Brown v. Board of Education*.”¹⁵²

When Coalition members spoke to the press on behalf of Freedom to Marry, they not only borrowed the rhetoric of *Goodridge* but also described the decision as primarily an equality-based one. When speaking to the *Washington Post*, for example, Wolfson compared the same-sex marriage struggle to the effort to “end . . . race discrimination in marriage, and women’s subordination in marriage.”¹⁵³

Freedom to Marry members continued making equal-rights arguments drawn from *Goodridge* as members of the Massachusetts State Legislature proposed alternatives to same-sex marriage, including a state constitutional ban and some form of civil union statute.¹⁵⁴ In February 2004, when the Massachusetts Supreme Judicial Court clarified that only marriage would satisfy the requirements set forth in the *Goodridge* decision, Coalition members again called *Goodridge* a case that was decided “in favor of marriage equality” and was intended

146. *Id.* at 961-64.

147. *Id.* at 953.

148. *Id.* at 966 (quoting *United States v. Virginia*, 518 U.S. 515, 557 (1996)).

149. Summary of Staff Meeting on Civil Marriage (Nov. 21, 2003), in *The PFLAG Papers*, The Human Sexuality Archive, Division of Rare and Manuscript Collections (on file with Cornell University).

150. *Id.*

151. *Id.*

152. *Id.*

153. David Von Drehle, *Gay Marriage Is a Right, Massachusetts Court Rules*, WASH. POST, Nov. 19, 2003, at A1.

154. For contemporary coverage of the Massachusetts Legislature’s search for legislative alternatives, see Frank Phillips & Rick Klein, *Lawmakers Are Divided on Response*, BOSTON GLOBE, Nov. 19, 2003, at A1.

to show “that there [was] no good reason to deny same-sex couples the equal freedom to marry, as protected by the Constitution.”¹⁵⁵

By the end of 2004, Freedom to Marry was using similar equal rights rhetoric in defining its own constitutional values and program of reform. As a part of this effort, Coalition members described same-sex marriage as a civil rights issue that should be supported by racial and ethnic minorities. The National Gay and Lesbian Task Force, a key member of the Coalition, published a report suggesting that “black gay and lesbian couples actually have more to gain on average from the ability to marry.”¹⁵⁶ Sean Cahill, the director of the National Gay and Lesbian Task Force Policy Institute, argued that constitutional amendments banning same-sex marriage “represent[ed] an issue of racial and economic justice.”¹⁵⁷ Dr. Kenneth Samuel of the Victory Church of Stone Mountain, Georgia, an African-American pastor invited to speak by the Task Force, told the press that “homophobia and racism, along with sexism, [were] really three heads to the same monster.”¹⁵⁸

In this way, over time, Freedom to Marry came to define its legal reform agenda as one of marriage equality.¹⁵⁹ By 2004, in a set of talking points issued to Freedom to Marry members, leaders described the organization as one focused on the “shared goal of securing full equality and protections under the law,” an organization involved in a “civil rights struggle.”¹⁶⁰

B. *The Human Rights Campaign*

In 1982, the Human Rights Campaign was formed as a federally registered political action committee designed to provide financial support to political candidates supportive of gay rights.¹⁶¹ From the time of its founding, the Human Rights Campaign portrayed itself as bipartisan, moderate, and politically influential.¹⁶² In its early years,

155. Press Release, Freedom to Marry, Equal Means Equal, Freedom to Marry Applauds Latest Massachusetts Court Decision (Feb. 4, 2004), http://www.archive-freetomtomarry.org/press_center/equal_means_equal.php.

156. The National Gay and Lesbian Task Force, Black Same-Sex Marriage Households Report Conference Call (Oct. 6, 2004), in The National Gay and Lesbian Task Force Collection, The Human Sexuality Archive, Division of Rare and Manuscript Collections (on file with Cornell University).

157. See *id.* at 4.

158. See *id.* at 9.

159. Draft of Talking Points for “Who Is This Group Anyway?” (2004), in The PFLAG Papers, The Human Sexuality Archive, Division of Rare and Manuscript Collections (on file with Cornell University).

160. *Id.*

161. See Michael Oreskes, *Dinner By Homosexuals Will Aid Political Drives*, N.Y. TIMES, Sept. 4, 1982, at 25; see also Colman McCarthy, *Gay Rights and Gay Acceptance*, WASH. POST, Oct. 9, 1982, at A19.

162. See Adam Nagourney, *A Movement Divided Between Push and Shove*, N.Y. TIMES, Oct. 25, 1998, at WK3.

the organization focused on raising funds for the election of gay-rights advocates,¹⁶³ but by the mid-1980s, with the rise of the AIDS epidemic, it also promoted funding for AIDS research and legislation preventing legal discrimination against gays.¹⁶⁴ The Human Rights Campaign also played a key role in lobbying for federal legislation requiring that records of hate crimes be kept and in advocating reforms covering sexual orientation discrimination.¹⁶⁵

In 1996, when the organization first spoke publicly on the issue, Elizabeth Birch, the executive director of the Human Rights Campaign, called for gay rights organizations not to focus on same-sex marriage.¹⁶⁶ Calling it an issue “whose time [had] not yet come,” Birch argued that gay rights groups played into the hands of conservatives by talking about same-sex marriage.¹⁶⁷ Instead, Birch argued that groups like the Human Rights Campaign should “get out in front and get control of [their] own agenda[s]” by stressing issues that enjoyed popular support, especially employment discrimination.¹⁶⁸

In the years between the introduction of the Defense of Marriage Act and the decision of *Baker*, the Human Rights Campaign followed the evolution of constitutional arguments for same-sex marriage. The Campaign also urged Freedom to Marry and other organizations to “fram[e] th[e] issue [of same-sex marriage] in terms of basic human rights and individual personal choices,” because “[m]ost voters [did] not believe [that] marriage [was] a civil right.”¹⁶⁹ The Campaign supported the efforts of the Freedom to Marry Coalition and made strategy recommendations to members of the same-sex marriage movement.¹⁷⁰ In particular, the Campaign advised activists not to make equality-based or civil rights arguments but to assert instead that “[a]dults

163. For an example of early fund-raising goals, see Dudley Clendinen, *Throughout the Country; Homosexuals Increasingly Flex Political Muscle*, N.Y. TIMES, Nov. 8, 1983, at A26.

164. See, e.g., Betty Cuniberti, *Aid for Friends of AIDS Research Lavish Washington Dinner Raises \$130,000 for Campaigns*, L.A. TIMES, Sept. 30, 1985, at 1; Pierre Thomas, *Thousands Rejoice at Gay Pride Day; Celebration Deemed The ‘Biggest Ever,’* WASH. POST, June 19, 1989, at D1.

165. See, e.g., *Bush Signs Act Requiring Records on Hate Crimes; Law Called Fruit of ‘Unprecedented Collaboration’ of Civil Rights, Religious, Gay Groups*, WASH. POST, Apr. 24, 1990, at A6.

166. See Hanania, *supra* note 83.

167. *Id.*

168. *Id.*

169. *Marriage: Toughest Battle Lies Ahead*, HRC Q. (Winter 1996), in The Human Rights Campaign Collection, Division of Rare and Manuscript Collections (on file with Cornell University).

170. See, e.g., Human Rights Campaign, *Talking Points, Same-Sex Marriage: Where the Issue Stands*, HRC’s Role (Feb. 3, 1997), in The National Gay and Lesbian Task Force Collection, The Human Sexuality Archive, Division of Rare and Manuscript Collections (on file with Cornell University).

should be free to choose the person with whom they want to spend their life.”¹⁷¹

In public, by contrast, leaders of the organization did not speak about same-sex marriage or the constitutionality of existing marriage laws. Instead, Human Rights Campaign organizers worked to shift the nation’s attention to more popular gay rights issues, such as “hospital visitation” or “guardianship” rights.¹⁷² Primarily, the Campaign avoided an endorsement of same-sex marriage, focusing instead on employment discrimination on the basis of sexual orientation. The Human Rights Campaign led efforts to pass a federal Employment Non-Discrimination Act (ENDA) and lobbied heavily for employment discrimination protections for gay civil service employees.¹⁷³

Indeed, when the organization first circulated a pamphlet about same-sex marriage in the summer of 1999, the Human Rights Campaign adopted a strategy similar to the one used in the ENDA campaign—activists would avoid constitutional arguments and would instead draw attention to any positive change in popular opinion. In a pamphlet about the views of religious leaders on same-sex marriage, for example, the Human Rights Campaign characterized intense debate within religious communities as “a sign of [the] progress” of popular opinion on the issue.¹⁷⁴

Leaders of the Campaign initially did not make use of *Baker* or even focus on the issue of same-sex marriage. In supporting the presidential candidacy of Al Gore, for example, Elizabeth Birch spoke not about same-sex marriage but about hate crimes and employment discrimination.¹⁷⁵ In Vermont, as Democratic legislators were ousted in the 2000 elections for supporting civil union legislation, the Human Rights Campaign even considered supporting a Republican candidate who had not endorsed the civil union law.¹⁷⁶

However, in May of 2003, when the organization took a public stand in support of same-sex marriage and condemned the introduction of an anti-same-sex-marriage constitutional amendment, the group drew heavily on the rhetoric and reasoning of *Baker*. Birch borrowed the equality-based arguments that had emerged in *Baker*,

171. See Human Rights Campaign, *supra* note 97.

172. For examples of the focus of the Human Rights Campaign in the late 1990s, see *Democrats Give Health Benefits to Gay Couples*, N.Y. TIMES, May 17, 1997, at 11; Carolyn Lochhead, *Senate OKs Gay Marriage Restriction—Job Discrimination Bill Fails by One Vote*, S.F. CHRON., Sept. 11, 1996, at A1.

173. For coverage of ENDA and the group’s involvement, see, for example, Aline McKenzie, *Elizabeth Birch*, DALLAS MORNING NEWS, Feb. 15, 1998, at 1J.

174. Mary Leonard, *Activists Applaud Report on Churches, Gays*, BOSTON GLOBE, Aug. 12, 1999, at A5 (describing the pamphlet circulated by the organization).

175. See Robin Toner, *A Gay Rights Rally Over Gains and Goals*, N.Y. TIMES, May 1, 2000, at A14.

176. See Ben White, *Vermont Divisions Harden Over Civil Unions Law*, WASH. POST, Sept. 17, 2000, at A6.

stating that the Constitution was “designed to protect the basic equality and civil rights of all Americans.”¹⁷⁷ In explaining the organization’s position on the constitutionality of same-sex marriage laws, Birch argued that “[t]he bottom line on the issue of marriage [was] that gay and lesbian couples deserve the same rights and protections that most other American families take for granted.”¹⁷⁸ *Baker* helped to legitimate and make salient this particular kind of claim.

Because *Lawrence* was rhetorically and doctrinally ambiguous, members of the Campaign made a variety of equality- and rights-based arguments in the immediate aftermath of the decision. For example, Winnie Stachelberg, the organization’s political director, criticized supporters of the anti-same-sex-marriage amendment for not having “read the opinion in the *Lawrence* case,” which was “first and foremost about affirming every American’s right to privacy.”¹⁷⁹ To support the constitutional amendment, Stachelberg argued, would be to “erase the right to privacy.”¹⁸⁰

The wide range of arguments made after *Lawrence* was also reflected in the organization’s July 2003 “Rapid Response Campaign,” a program designed to capitalize on a potential victory in *Goodridge*.¹⁸¹ The \$1,000,000 campaign was intended to “frame the debate and shape public opinion about civil marriage for gay and lesbian couples” through polling, public education, and lobbying.¹⁸² In addition to emphasizing equal protection arguments,¹⁸³ members of the Human Rights Campaign were instructed to argue that “[m]arriage ought to be a matter of individual personal decision,” a privacy interest like the one described in *Lawrence*.¹⁸⁴ As the *Lawrence* Court was thought to have done, Human Rights Campaign members were also told to state that “[t]he decision of whom to marry should be left to individuals—not dictated by the government.”¹⁸⁵

Goodridge again allowed Campaign members to shift the balance of arguments used by its members, this time increasing the prominence of equal protection and civil rights contentions. In a public

177. Press Release, Human Rights Campaign, HRC Condemns Introduction of Anti-Gay Constitutional Amendment (May 28, 2003), in The Human Rights Collection, Division of Rare and Manuscript Collections (on file with Cornell University).

178. *Id.*

179. Press Release, Human Rights Campaign, HRC Denounces Frist’s Attack on Gay Families (June 30, 2003), in The Human Rights Collection, Division of Rare and Manuscript Collection (on file with Cornell University).

180. *Id.*

181. See Letter from Human Rights Campaign, HRC’s Rapid Response Campaign (July 2003), in The Human Rights Collection, Division of Rare and Manuscript Collections (on file with Cornell University).

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

education initiative, the Human Rights Campaign noted that the *Goodridge* Court had stated that same-sex couples had been “excluded from the full range of human experience and denied full protection of the laws” and that same-sex marriage would not diminish the value of existing marriages “any more than recognizing the right of an individual to marry a person of a different race devalues . . . marriage.”¹⁸⁶

In its new 2004 campaign against a proposed federal antimarriage amendment, the Human Rights Campaign borrowed the civil rights and equality-based rhetoric of *Goodridge*.¹⁸⁷ The Campaign claimed that “[t]o settle for anything less than full equality on th[e] issue [of marriage rights] would be a setback for [the] movement” and would “impose second-class citizenship for gays.”¹⁸⁸ To illustrate this point, the organization compared the same-sex marriage movement to the civil rights movement:

Few know that when Rosa Parks and Dr. King *began* the Montgomery Bus Boycott, they were *not* asking for full desegregation and equality in public transportation, just more consideration of African Americans in an already segregated public transport system. But once the battle was joined by the other side, with the bigots refusing any compromise, the Montgomery movement had no choice but to escalate their demands. . . . On same-sex marriage, the LGBT community has reached a similar juncture.¹⁸⁹

In the years immediately following *Goodridge*, the Human Rights Campaign continued drawing on the decision’s equality-based rhetoric in its own advocacy. In marking the anniversary of *Goodridge* in 2004, for example, the Campaign praised the decision for recognizing the importance of “equality under the law.”¹⁹⁰ The organization also began sponsoring events in order to show that the same-sex marriage movement was a civil rights movement. In June of 2004, the organization held a press conference attended by prominent African American clergymen and civil rights leaders who also opposed the federal

186. Memorandum, Human Rights Campaign, *Goodridge v. Department of Public Health: Civil Marriage Equality Is Required by the Massachusetts Constitution* (Dec. 2003), in The Human Rights Collection, Division of Rare and Manuscript Collections (on file with Cornell University); Key Statements on FMA/Marriage/*Goodridge*: Nov. 18 – Dec. 5, 2003, in The Human Rights Collection, Division of Rare and Manuscript Collections (on file with Cornell University); see also Letter from Leadership Conference on Civil Rights, Oppose the Federal Marriage Amendment (Sept. 3, 2003), in The Human Rights Collection, Division of Rare and Manuscript Collections (on file with Cornell University).

187. Letter from Robin Tyler & Andy Thayer, National Co-organizers, DontAmend.com, Don’t Amend: Gay Marriage Is Our Right, in The Human Rights Collection, Division of Rare and Manuscript Collections (on file with Cornell University).

188. *Id.*

189. *Id.*

190. Human Rights Campaign, *HRC Statement on Anniversary of Goodridge Marriage Decision*, HRC.ORG (Nov. 18, 2004), <http://www.hrc.org/press-releases/entry/hrc-statement-on-anniversary-of-goodridge-marriage-decision>.

marriage amendment.¹⁹¹ In a press release about the event, the Campaign stressed its alliance with the National Black Justice Coalition and reiterated its view that “[n]o one [knew] the cost of restricting rights better than African-Americans.”¹⁹² Later, in 2005, the organization gave a “National Civil Rights Award” to former NAACP Chairman Julian Bond in recognition of his support for *Goodridge* and same-sex marriage.¹⁹³

Over time, the Campaign increasingly described same-sex marriage in terms used by the courts in *Baker* and *Goodridge*. In the fall of 2003, the organization had primarily described marriage as an issue of intimate association, personal choice, and constitutional privacy. By 2005, and partly because of *Goodridge*, the right to marry had become a right to “marriage equality.”¹⁹⁴

C. The Changing Opposition

Between 1995 and 2006, major organizations opposed to the legalization of same-sex marriage also changed their rhetorical strategies and did so partly in response to the success their opponents had in drawing on the rhetoric of the *Baker* and *Goodridge* decisions. Before the issuance of these opinions, major New Right organizations often described the same-sex marriage debate as a referendum on the legitimacy or social acceptance of homosexuality or emphasized claims that same-sex marriage would undermine the nuclear family and heterosexual marriage. *Goodridge*, and the use of it by the same-sex marriage movement, forced these groups to rework some of their argumentative strategies in a way that may well have benefited the same-sex marriage cause. The opinion helped to increase the prominence of equality-based and civil rights claims made by proponents of same-sex marriage. In part because of *Goodridge*, anti-same-sex-marriage activists responded by focusing less on the social harms produced by gay couples and more on the freedom of belief and the parental rights of citizens potentially opposed to same-sex marriage.

191. Human Rights Campaign, *HRC Joins African-American Church Leaders in Opposition to Federal Marriage Amendment*, HRC.ORG (June 24, 2004), <http://www.hrc.org/press-releases/entry/hrc-joins-african-american-church-leaders-in-opposition-to-federal-marriage>.

192. *See id.*

193. *See* Press Release, Human Rights Campaign, Human Rights Campaign Marks 25th Anniversary at National Dinner (Oct. 3, 2005), <http://www.hrc.org/press-releases/entry/human-rights-campaign-marks-25th-anniversary-at-national-dinner>.

194. For an overview of the organization's current activities in this vein, see MARRIAGE EQUALITY, <http://www.marriageequality.org/> (last visited Apr. 25, 2012).

D. The Traditional Values Coalition

Founded in 1980 by the Reverend Louis Sheldon, the Traditional Values Coalition, or TVC, is a lobbying group representing 43,000 churches.¹⁹⁵ Before founding the TVC, Sheldon already had focused a significant part of his political career on opposing gay rights. His entry into politics came with the ultimately unsuccessful 1977 California initiative, sponsored by state legislator John Briggs, that would have allowed school boards to dismiss or deny employment to “open and notorious homosexuals.”¹⁹⁶ In 1978 Sheldon also played a key role in campaigning for a failed initiative requiring the dismissal of all openly gay public school teachers.¹⁹⁷

With the formation of the TVC in 1980, Sheldon embraced a vision of legal reform that drew on Christian religious teachings and an originalist interpretation of the Constitution. As the TVC explained in its mission statement:

Traditional Values are based upon biblical foundations and upon the principles outlined in the Declaration of Independence, our Constitution, the writings of the Founding Fathers, and upon the writings of great political and religious thinkers throughout the ages.

....

In short, Bible-based traditional values are what created and what have preserved our nation. We will lose our freedoms if we reject these values.¹⁹⁸

Sheldon’s reform vision was at its most influential between 1990 and 1994 when the TVC campaigned against state- and municipal-level laws banning sexual orientation discrimination in employment, housing, and public accommodations. After 1991, when the TVC successfully led lobbying efforts to convince California Governor Pete Wilson to veto an anti-sexual-orientation-discrimination employment law, the TVC expanded its campaign, sponsoring “anti-special-rights” legislation and constitutional amendments in Colorado, Arizona, Oregon, Washington, and Missouri.¹⁹⁹

The *Baehr* decision did make opposition to same-sex marriage an organizational priority for the TVC, however, Sheldon framed the issue not as one about the propriety of same-sex marriage but instead

195. *About TVC*, TRADITIONAL VALUES COALITION, <http://traditionalvalues.org/content/about> (last visited Apr. 25, 2012).

196. Grace Lichtenstein, *California Homosexuals Prepare for Schools Battle*, N.Y. TIMES, Aug. 8, 1977, at 35. *See also* David W. Dunlap, *Minister Brings Anti-Gay Message to the Spotlight*, N.Y. TIMES, Dec. 19, 1994, at A16.

197. Dunlap, *supra* note 196.

198. *About TVC*, *supra* note 195.

199. *See* Steven A. Holmes, *Gay Rights Advocates Brace for Ballot Fights*, N.Y. TIMES, Jan. 12, 1994, at A17.

as a referendum on the legitimacy of homosexuality. He criticized *Baehr* by explaining that “[w]hat [gays] really want[ed] [was] acceptance, and that [was] something we [could not] give to them.”²⁰⁰ Moreover, in working closely with the wave of “family values” Republicans elected to Congress in 1994, Sheldon focused as much on campaigning for “anti-special-rights” legislation as he did on opposing same-sex marriage.²⁰¹

Between 1995 and 2003, as the TVC partnered with other New Right organizations in campaigning for state and federal defense-of-marriage legislation, Sheldon continued to emphasize the broader harm that a “homosexual lifestyle” would do to American culture and gender relations rather than the effect that same-sex marriage would have on straight unions. In 1996, for example, while campaigning for a defense-of-marriage measure in California, Sheldon told the *Baltimore Daily Record* that “[l]egalizing homosexual marriage would place our youth at risk, in addition to having a disastrous effect on individual citizens, businesses, churches and practically every segment of our society.”²⁰² In 1997, Sheldon expanded on this critique, proposing that legalizing same-sex marriage would result in the “degendering” of America.²⁰³

It was the *Goodridge* opinion that helped to reshape the TVC’s rhetorical strategies. Before *Goodridge*, members of the TVC focused not on marriage itself but on the damage that social acceptance of homosexuality would do to American culture. Partly because of *Goodridge* and the success that same-sex marriage groups had in drawing on it, the TVC deemphasized these claims, stressing instead that a majority in the United States opposed same-sex marriage: as one representative explained in 2003, “[w]e have found that the more people focus on [same-sex marriage], the less they support it.”²⁰⁴ In the winter of 2004, the TVC elaborated on this strategy, bringing African-American ministers to condemn marriage equality and to join in a “state-by-state grassroots effort to pass legislation protecting marriage.”²⁰⁵

200. Bettina Boxall, *Hawaii Justice Opens Door to Legalizing Gay Marriages Law: State High Court Calls Ban Unconstitutional and Orders a Trial*, L.A. TIMES, Mar. 26, 1995, at 1.

201. See Holmes, *supra* note 199.

202. *California Gay Marriage Ban Encounters First Senate Test*, DAILY REC., July 10, 1996, at 1.

203. See Evan Wolfson, *How to Win the Freedom to Marry*, 4 HARV. GAY & LESBIAN REV. 29, 30 (1997) (quoting Rev. Lou Sheldon).

204. See Katherine Q. Seelye & Janet Elder, *Poll: America Widely Against Gay Marriage*, TIMES ARGUS, Dec. 21, 2003, available at 2003 WLNR 18711590 (quoting Rev. Lou Sheldon).

205. Don Lattin, *Black Clergy Gathering to Fight Gay Matrimony*, S.F. CHRON., May 15, 2004, at A4.

The campaign, which insisted that “gay marriage is not a civil right,”²⁰⁶ downplayed direct criticism of gay couples and highlighted arguments that gays were engaged in “destructive” but “curable” behavior.²⁰⁷ Instead of framing their struggle as one against a malignant “homosexual agenda,” TVC members focused on refuting the civil rights rhetoric of *Goodridge*.²⁰⁸ The TVC also claimed to represent the freedoms of those with religious objections to same-sex marriage: as one spokesman put it, “I think people, for the most part, are fed up with this issue being shoved in their face.”²⁰⁹

E. Focus on the Family

Founded in 1977 by child psychologist and minister Reverend James Dobson, Focus on the Family is a nonprofit corporation and Christian media outlet that currently reaches 5,000 radio and television stations in 155 countries.²¹⁰ Led exclusively by Dobson from the time of its founding until 2003, Focus exercises policy influence primarily through its radio broadcasts, television programs, and film series.²¹¹ However, Dobson and his successors, Don Hodel (named to the position in 2003) and Jim Daly (named to the position in 2005), have routinely been active in electoral and legislative campaigns, as well as in public interest litigation.²¹²

Between 1985 and 1999, Dobson and Focus highlighted legitimacy-based and defense-of-marriage claims. In a summer 1998 fundraising letter, for example, Dobson presented the same-sex marriage struggle as a referendum on the social acceptability of homosexuality, arguing that the “highly coordinated . . . effort[s]” to establish same-sex marriage were not the true focus of gay activists.²¹³ Instead, as he wrote,

206. R. CLAIRE SNYDER, *GAY MARRIAGE AND DEMOCRACY: EQUALITY FOR ALL* 117 (2006).

207. See Hanna Rosin, *A Family Business: For the Rev. Lou Sheldon and his Daughter, Marriage Means Only One Thing*, WASH. POST, May 20, 2004, at C1 (describing the “Gay Marriage Is Not a Civil Right” Campaign).

208. See *id.*

209. See Jim Sanders, *Gay Couples to Acquire New Rights: Domestic Partnerships Will Soon Gain Marriagelike Protections and Obligations, but Not Everyone is Celebrating*, SACRAMENTO BEE, Dec. 31, 2004, at A3.

210. See Hans Johnson, *Onward, Christian Soldiers: Christian Radio Proves a Potent Medium for Antigay Politics*, ADVOC., Feb. 15, 2000, at 30.

211. See *id.*

212. For coverage of the transitions between different presidents of Focus, see *Rival Prayer Events Slated*, RICHMOND TIMES-DISPATCH, Apr. 20, 2003, at A17 (discussing Dobson taking a diminished role); *Historical Timeline: A Look at the First 30 Years of Focus on the Family*, FOCUS ON THE FAMILY, http://www.focusonthefamily.com/about_us/news_room/history.aspx (last visited Apr. 25, 2012).

213. See James C. Dobson, *Cult and Fringe Christianity Studies: The Error of Homosexuality*, BIBLETEACHER.ORG, <http://www.bibleteacher.org/Dm073.htm> (last visited Apr. 25, 2012).

“Most importantly, activists want homosexuality to be seen and sanctioned as the moral equivalent of heterosexuality.”²¹⁴

However, in a November 1999 fundraising campaign, Dobson identified same-sex marriage as a greater threat to the institution of marriage than no-fault divorce or premarital cohabitation, for only same-sex marriage was argued to “destroy the legal underpinnings of the family.”²¹⁵ Similar arguments remained at the center of Focus’s strategy through the winter of 2000 when Focus activists played key roles in the battle for a defense-of-marriage act in California. As Dobson wrote in a fundraising letter: “If homosexuals are permitted to marry, then the entire legal basis for the family [will be] undermined. . . . Marriage would mean anything—or, more likely, nothing at all.”²¹⁶

Goodridge marked a significant shift in the organization’s argumentative strategies. By March 2004, Focus had become a prominent member of the Arlington Group, a coalition of conservative organizations and leaders opposed to same-sex marriage.²¹⁷ The following May, when serving as the keynote speaker at Mayday for Marriage, an important opposition event, Dobson demonstrated a different rhetorical strategy, one highlighting not only the threat posed by gays to heterosexual marriage but also the harmful effects that same-sex marriage would have on public schools’ curricular programming.²¹⁸ First, Dobson openly denounced homophobia, suggesting that Focus members were “not here to harm or disrespect” the gay activists present at a counter-rally.²¹⁹ Dobson further emphasized that proponents of same-sex marriage, not its opponents, promoted discrimination.²²⁰ He stressed that same-sex marriage would deny parents the right to raise their children as they saw fit, for “[p]ublic schools [would] be used as propaganda machines for the gay agenda.”²²¹

Dobson built on this strategy after 2004 when he founded Focus on the Family Action, a 501(c)(4) organization more involved in electoral politics than Focus on the Family, a 501(c)(3) corporation—a nonprofit corporation.²²² Parental-rights arguments were featured prominently in 2006 in political advertisements run by Focus Action

214. *Id.*

215. Ross, *supra* note 88, at 265 n.50.

216. Letter from James Dobson, Protecting Marriage: California Voters Will Decide the Future of Marriage (Feb. 2000), available at <http://www.beliefnet.com/Love-Family/2000/03/Protecting-Marriage.aspx>.

217. See David Von Drehle & Alan Cooperman, *Same-Sex Marriage Vaulted Into Spotlight*, WASH. POST, Mar. 8, 2004, at A1.

218. See *Love and Marriage; Christian Message Undercut by Arrest*, STRANGER, May 19, 2004, at 14.

219. *Id.*

220. See *id.*

221. *Id.*

222. See Brian MacQuarrie, *Dobson Turns Spiritual Empire Into Political Clout*, BOSTON GLOBE, Oct. 9, 2005, at A1.

during congressional races as is exemplified by the one run against Ken Salazar of Colorado.²²³ Later, in September 2006 at the Values Voter Summit, an annual event sponsored by the Family Research Council, a sister organization, Focus Action and other groups at the summit spoke in favor of a similar strategy in response to *Goodridge*. As reported in the *New York Times*, Focus Action activists “said they were taking up the argument that legal recognition of same-sex marriages would cramp the free expression of religious groups who consider such unions a sin.”²²⁴

This strategy was further clarified during the 2008 campaign for Proposition Eight, a state constitutional initiative in California proposed to overrule a state supreme court decision requiring access to marriage for same-sex couples.²²⁵ Focus Action funded and helped to design advertisements that did not directly challenge the equality claims made in *Goodridge*. Instead, the Focus Action advertisements drew on the equality rhetoric from *Goodridge* as supporting a right to oppose same-sex marriage.²²⁶ If same-sex marriage were legalized in California, the advertisements reasoned, “[m]inisters [would] be jailed if they preach[ed] against homosexuality” and “[p]arents [would] have no right to prevent their children from being taught in school about same-sex marriage.”²²⁷ Instead of concentrating on the potential flaws with the equality-based language in *Goodridge*, Focus borrowed from it. As recently as 2011, Dobson has continued to insist that “if same sex marriage is legalized and the rest of the gay agenda is achieved, the church will be subjected to ever-increasing oppression and discrimination.”²²⁸

F. The Family Research Council

Formerly a part of Focus on the Family, the Family Research Council was founded in 1981 to pursue “value-based” lobbying about legal reforms concerning divorce, homosexuality, and other issues about which Focus could do only a limited amount of lobbying with-

223. Jim Rutenberg, *Conservatives Watching Senate Debate on Gay Marriage*, N.Y. TIMES, June 6, 2006, at A19.

224. David D. Kirkpatrick, *Christian Conservatives Look to Re-Energize Base*, N.Y. TIMES, Sept. 25, 2006, at A16.

225. For a description of Proposition Eight, see Janet Kornblum, *Post-Prop 8, Thousands Join Protest: Gay-Marriage Ban in California Stirs Torchbearers*, USA TODAY, Nov. 14, 2008, at 3A.

226. Laurie Goodstein, *California, a Line in the Sand for Same-Sex Marriage Foes*, N.Y. TIMES, Oct. 27, 2008, at A12.

227. *Id.*

228. *Marriage Under Fire*, MONTHLY NEWSL. (Dr. James Dobson’s Family Talk, Colorado Springs, Colo.) (July 2011), available at http://drjamesdobson.org/About/Commentaries/marriage_under_fire (last visited Apr. 25, 2012).

out risking its nonprofit status.²²⁹ After formally separating from Focus in 1992, the Council pursued several activities in addition to its lobbying, engaging in public interest litigation and sending educational materials to possible supporters.²³⁰

In the early 1990s, under the leadership of former Reagan policy advisor Gary Bauer, the Council emphasized policy reforms unrelated to sex and sexuality. In 1992, for example, Bauer suggested that the group's chief concern was with the lax Bush Administration policy on "unwholesome TV programming and other threats to children."²³¹ In the early 1990s, the Council also addressed the issue of religious harassment and discrimination, campaigning for changes in the Equal Employment Opportunity Commission's Guidelines on religious harassment and discrimination and promoting the ultimately unsuccessful Religious Equality Amendment.²³²

After *Baehr* brought new attention to the same-sex marriage issue in 1993, the Council, as had Focus on the Family, portrayed the issue of same-sex marriage as one involving the acceptability of homosexuality as a lifestyle. In responding to the *Baehr* decision, Robert Knight of the Council told the *New York Times* that the decision should be condemned because it was "part of the pan-sexual movement's attempt to deconstruct . . . morality in the culture."²³³ Council leaders like Knight and Bauer continued to stress legitimacy-based arguments during hearings about the federal Defense of Marriage Act. When testifying before Congress in favor of the federal Defense of Marriage Act in 1996, Bauer explained that accepting same-sex marriage would require Congress to "restructure our entire sexual morality and social system to embrace a concept that has never been accepted anywhere in the world by any major culture."²³⁴

229. See *History/Mission: A Quarter Century of Advancing Faith, Family and Freedom*, FAMILY RESEARCH COUNCIL, <http://www.frc.org/historymission> (last visited Apr. 25, 2012).

230. See *id.*

231. John Harwood, *Campaign '92: Bush Stresses Family Values as His Theme*, WALL ST. J., Mar. 2, 1992, at A14. For an account of Bauer's earlier career, see Gerald Seib, *Capital Journal: Who Will Muster Christian Army in Reed's Wake*, WALL ST. J., Apr. 30, 1997, at A16.

232. See Matthew Dorf, *News Analysis: Clinton's Initiative on Prayer Could Increase Religion in School*, JEWISH TELEGRAPHIC AGENCY, July 17, 1995, at 1 (describing the Religious Equality Amendment proposed to overrule Supreme Court decisions forbidding school prayer); Robert Israel, *Who's Harassing Whom?: EEOC Guidelines on Religious Harassment Debated*, JEWISH ADVOC., June 16, 1994, at 1 (discussing the EEOC Guidelines); *Religious Right Ready to Press GOP to Enact Its Agenda*, DALLAS MORNING NEWS, May 15, 1995, at 3A.

233. Jane Gross, *After a Ruling, Hawaii Weighs Gay Marriages*, N.Y. TIMES, Apr. 25, 1994, at A1.

234. *The Defense of Marriage Act: Hearing on S. 1740 Before the S. Comm. on the Judiciary*, 104th Cong. 22 (1996) (statement of Gary L. Bauer, President, Family Research Council).

It was only in responding to the *Baker* decision that the Council began emphasizing defense-of-marriage rather than legitimacy-based claims. For example, in February 2000, Bauer identified *Baker* as “an unmitigated disaster for the American family.”²³⁵ The following March, the Council’s chief spokesperson Janet Parshall employed a similar rhetorical strategy, explaining that opposition to same-sex marriage was necessary for the “defense of marriage.”²³⁶ As Parshall explained, “Giving same-sex relationships or out-of-wedlock heterosexual couples the same special status and benefits as the marital bond would not be the expansion of a right but the destruction of a principle.”²³⁷ Before the winter of 2003, the Council emphasized similar claims in opposing a proposed domestic-partnership law in California and a Vermont civil union measure introduced in response to *Baker*. As then-Council President Kevin Connor explained in the organization’s newsletter, same-sex unions posed the most “serious threat to marriage since the states foolishly chose no-fault divorce in the 1960s.”²³⁸

Goodridge prompted Council leaders to reconsider such argumentative strategies. In February 2004, the Council sponsored advertisements not directly justifying unequal treatment of gay couples but rather focusing on public schools’ curricular programming.²³⁹ In particular, the advertisements claimed that “[c]ertainly teachers would have to teach that marriage has more than one option.”²⁴⁰ In September 2004, the Council sponsored a simulcast, titled the “Battle for Marriage,” emphasizing claims that same-sex marriage would “threaten religious freedom and force schools to teach homosexuality as an acceptable lifestyle.”²⁴¹

In the fall of 2006, at the Values for Voters Summit, Tony Perkins, a leader of the Council, did not focus on criticizing *Goodridge* but instead emphasized the equality interests of opponents of same-sex marriage.²⁴² Invoking *Goodridge*, Perkins contended that “the advancement of same-sex marriage” threatened “religious liberties.”²⁴³ In a promotional film circulated throughout the evangelical commu-

235. Gallagher, *supra* note 117, at 29-30.

236. Press Release, Family Research Council, FRC Reports: California Citizens Send Message to States - Leave Marriage Alone, PR NEWswire (Mar. 8, 2000).

237. *Id.*

238. Press Release, Family Research Council, FRC: Civil Unions Bill Shelved Due to Grass Roots Pressure, PR NEWswire (Jan. 15, 2002).

239. Press Release, Family Research Council, FRC Action Targets Boston Airwaves with Same-Sex ‘Marriage’ Ad Campaign, PR NEWswire (Feb. 3, 2004).

240. *Id.*

241. Press Release, Family Research Council, FRC Hosts Leading Pro-Family Voices in Nationwide Broadcast to Protect Marriage, PR NEWswire (Sept. 20, 2004).

242. Michael Paulson, *Group to Rally Opposition to Gay Marriage*, BOSTON GLOBE, Oct. 15, 2006, at A1.

243. *Id.*

nity, Perkins urged believers to “[g]et involved . . . before religious liberty is lost forever.”²⁴⁴

In the lead-up to the “Yes on Proposition Eight” Campaign, the Council further refined the religious-liberty and parental-rights arguments developed in response to *Goodridge*. In July 2008, the Council sponsored a panel discussion centering on these claims and addressing “Religious Liberty and . . . Counterfeit Marriage.”²⁴⁵ The panel focused on “the threat posed to First Amendment rights and religious liberty protections” and asked whether “churches [would] be able to deny marri[age to] homosexual couples” and whether “Christian organizations [would be able to] retain their religious identity and beliefs” if same-sex marriage were legalized.²⁴⁶ The Council’s advertisements that ran during the “Yes on Prop 8” Campaign also drew on the parental-rights claims forged in response to *Goodridge*, as promotional materials insisted that Proposition Eight has “everything to do with schools.”²⁴⁷

The Council’s new argumentative emphasis had been crafted in response to *Goodridge*. Because *Goodridge* had drawn considerable attention to the issue of equal treatment, the Council downplayed claims that homosexuals could never and should never be treated with dignity or respect. Instead, Council members accepted the *Goodridge* Court’s concern about discrimination in the same-sex marriage debate. However, as the 2008 panel discussion illustrated, Council activists presented religious opponents of same-sex marriage, not gays or lesbians, as the ones likely to be subject to discrimination.

V. RHETORICAL STAKES: SHIFTING COALITIONS IN MASSACHUSETTS

Baker and *Goodridge* helped to shift the argumentative strategies adopted by organizations on either side of the same-sex marriage debate, empowering same-sex marriage advocates who wanted to make different and previously disfavored claims. It is worth considering the impact that these decisions had on the alliances, as well as on the arguments, in the struggle. Leading studies acknowledge that major decisions like *Baker* and *Goodridge* have impacted the same-sex marriage debate, but current scholarship suggests that the effects of these decisions have been clearly and almost primarily negative for the same-sex marriage movement. However, as we shall see, *Goodridge*

244. Kirkpatrick, *supra* note 224.

245. Press Release, Family Research Council, FRC to Host Panel Discussion on Religious Liberty and California Counterfeit Marriage, PR NEWswire (July 2, 2008).

246. *Id.* (internal quotation marks omitted).

247. VoteYesonProp8, *Yes on 8 TV Ad: Everything To Do With Schools*, YOUTUBE (Oct. 20, 2008), <http://www.youtube.com/watch?v=7352ZVMKBQM&noredirect=1>; see also Lisa Leff & Juliet Williams, *Prop. 8 Debate Targets Schools*, DESERET NEWS (Salt Lake City), Oct. 23, 2008, at A09, available at <http://www.deseretnews.com/article/705257342/Prop-8-debate-targets-schools.html>.

also appears to have been an important tool to those within the same-sex marriage movement seeking to build new alliances.

It is difficult to say whether the same-sex marriage movement will benefit from its new set of alliances in the long term. However, before assessing whether *Goodridge* or *Baker* advanced the same-sex marriage cause, current studies must recognize that the players and terms of that debate have fundamentally changed. Similarly, it is possible that the litigation of *Perry* or *Gill* may reshape the coalitions in the debate in a way that would be advantageous for the same-sex marriage movement.

These changes become apparent when one studies the same-sex marriage debate in Massachusetts between 1999 and 2006. Two of the major players in the debate in this period were MGLPC and GLAD. Founded in 1973, MGLPC is a state-level, professional lobbying organization focused on gay rights issues.²⁴⁸ Before 1995 MGLPC had focused on HIV confidentiality legislation and antidiscrimination laws targeting employment and public accommodations.²⁴⁹ As we shall see, MGLPC began, in the mid-1990s, to commit more resources to securing legal recognition for same-sex couples. MGLPC was partnered in this effort by GLAD, a regional, litigation-oriented organization founded in 1978.²⁵⁰

A. Alliance-Building, Unions, and Libertarians

Before 1999 neither organization campaigned directly or made constitutional arguments in favor of constitutional marriage. GLAD and MGLPC focused instead on providing some same-sex couples benefits that ordinarily came through marriage, but the organizations did not demand legal recognition for same-sex relationships themselves. Chief among these efforts was Senate Bill 1332, a bill that would make health insurance available to same-sex partners of active or retired public employees.²⁵¹ In essence, the bill created a domestic partnership status, complete with procedures for establishing and terminating such partnerships.

However, Massachusetts organizations did not argue that same-sex relationships themselves were deserving of legal recognition or

248. See PATRICIA A. GOZEMBA & KAREN KAHN, *COURTING EQUALITY: A DOCUMENTARY HISTORY OF AMERICA'S FIRST LEGAL SAME-SEX MARRIAGES* 38 (2007).

249. For discussion of some of MGLPC's early work, see, for example, *A Gay Rights Law Is Voted in Massachusetts*, N.Y. TIMES, Nov. 1, 1989, at A27; Jane Meredith Adams, *Anger Toward Gays Is Out of the Closet: With Visibility Comes Abuse, Observers Say*, BOSTON GLOBE, Nov. 19, 1987, at 33.

250. See *About GLAD*, GLAD, <http://www.glad.org/about/> (last visited Apr. 25, 2012).

251. Memorandum from A. Joseph DeNucci, Auditor of the Commonwealth of Massachusetts, to Byron Rushing, House Chairman, Joint Comm. on Pub. Serv. (June 29, 1995), *The Massachusetts Gay and Lesbian Political Caucus Papers* (on file with the Northeastern University Archives).

equal legal treatment.²⁵² Instead, in 1998, gay rights groups agreed with MGLPC co-chair Arline Isaacson's view that domestic partnerships were merely an "issue . . . about equal pay for equal work."²⁵³ When domestic partnerships were described as an equal pay issue, labor organizations and their allies were more likely to support the measure. In Massachusetts, for example, the Board of the Massachusetts American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) endorsed the domestic partnership bill in 1998.²⁵⁴

Before *Goodridge* the groups also stressed that same-sex marriage was an issue of constitutional privacy. Groups like GLAD and MGLPC first made such constitutional arguments in favor of same-sex marriage in 1998 in response to a defense of marriage bill filed in the Massachusetts legislature.²⁵⁵ At the same time the Massachusetts DOMA bill was filed, libertarian organizations also proposed one abolishing restrictions on same-sex marriage and plural marriages and another eliminating any laws that punished "bedroom crimes."²⁵⁶ Gay rights organizations expressed interest in supporting the bill so long as it stated that "the right of two adults to marry is a fundamental one."²⁵⁷

Over time state gay rights organizations themselves began describing same-sex marriage as an issue of constitutional privacy. MGPLC and the Religious Coalition for the Freedom to Marry sent out brochures "affirm[ing] the liberty of adults of the same gender to love and marry" and "insist[ing] that no one, especially the state, [should] coerce people into marriage, or bar two consenting adults of the same gender from" marrying.²⁵⁸

252. See Massachusetts Gay & Lesbian Political Caucus, Domestic Partnership Fact Sheet: An Act Relative to Equal Employment Benefits For Public Sector Employees (1999) (on file with the Northeastern University Archives).

253. Massachusetts Gay & Lesbian Political Caucus, Domestic Partnership Efforts in Cities and Towns (1998) (on file with the Northeastern University Archives).

254. See *id.*

255. On the introduction and defeat of the Massachusetts State DOMA, see *supra* note 248.

256. On the Freedom of Marriage and the Freedom of Bedroom Acts in Massachusetts, see Doug Krick, Letter to the Editor, *Bill Would End All Restrictions on Marriage*, MASS. NEWS, Mar. 9, 1999, http://www.massnews.com/past_issues/2000/Letters/led19.htm. On the involvement of the Massachusetts Libertarian Party with the bill, see *More Bills in Committee*, MASS. LIBERTY, Mar. 1999, at 6, available at http://www.lpmass.org/files/Newsletter_199903.pdf.

257. Memorandum from Mary Bonauto, on behalf of GLAD, to Interested Persons (Jan. 25, 1998) (on file with the Northeastern University Archives).

258. *Declaration of Religious Support: Massachusetts Declaration of Religious Support for the Freedom of Same-Gender Couples to Marry*, RELIGIOUS COALITION FOR THE FREEDOM TO MARRY (2009), http://www.fpuucanton.org/pdfs/declaration_equal_marriage.pdf. The Religious Declaration is still used by Massachusetts groups supportive of same-sex marriage. See SARAH BARRINGER GORDON, *THE SPIRIT OF THE LAW: RELIGIOUS VOICE AND THE CONSTITUTION IN MODERN AMERICA* 169-75 (2010).

In turn, members of the coalition supporting same-sex marriage in Massachusetts in 2000 viewed marriage as a privacy or equal-pay issue. In 2000 the Massachusetts Freedom to Marry Coalition counted several unions as existing “coalition partners,” including the National Association of Social Workers and the Libertarian Party.²⁵⁹ Organizations that campaigned for the rights of racial or ethnic minorities, such as the NAACP, were only “prospect[ive]” allies.²⁶⁰

B. Alliance-Building and Civil Rights

In 2003, however, *Goodridge* affected the shape of this coalition by reframing same-sex marriage as an issue of constitutional equality. Because it made the question of civil rights more central in the argumentative strategies of both opponents and proponents of same-sex marriage, *Goodridge* provided a valuable tool for gay rights activists seeking to establish alliances with civil rights organizations. MGLPC began stressing that *Goodridge* had been a historic civil rights victory, and Arline Isaacson, a member of the group, compared opponents of *Goodridge* to racists refusing to desegregate public schools after *Brown v. Board of Education*.²⁶¹ The organization also asked the Massachusetts Democratic State Committee to endorse a resolution, stating that support for *Goodridge* required recognition that “[a]ll people should be treated equally and fairly under the law.”²⁶² GLAD similarly described civil unions or any legal status short of marriage as “separate and unequal.”²⁶³

Increasingly, and partly because of *Goodridge*, the debate about same-sex marriage became a discussion about the meaning of constitutional equality and the legacy of the civil rights movement. In the weeks following the decision of *Goodridge*, prominent African Americans discussed whether same-sex marriage could properly be considered an issue of constitutional equality. Carol Moseley Braun and Al Sharpton equated the same-sex marriage movement with the civil rights movement.²⁶⁴ Other civil rights leaders, like Julian Bond of the

259. See Meeting Agenda, Massachusetts Freedom to Marry Coalition (Jan. 19, 2000) (on file with the Northeastern University Archives).

260. See *id.*

261. See Steve Marantz, *Same-Sex Marriage Battle; Analysis; On Hill, it's No Honey-moon; Activists on Both Sides See Wedlock Deadlock*, BOS. HERALD, Feb. 13, 2004, at 5.

262. Res. 1, Mass. Democratic State Committee Resolutions (Jan. 29, 2004) (on file with the Northeastern University Archives).

263. Press Release, GLAD, GLAD Files Brief In Response to Senate Question: Calls Civil Unions Meaningful but Separate and Unequal to Marriage (Jan. 12, 2004), <http://www.glad.org/current/press-release/glad-files-brief-in-response-to-senate-question/>.

264. See, e.g., Sherri Williams, *Comparing Gay, Civil Rights a Divisive Issue for Blacks*, COLUMBUS DISPATCH, July 2, 2004, at A8.

NAACP and members of the National Black Justice Coalition, joined the debate in support of “marriage equality.”²⁶⁵

By contrast, other African-American leaders claimed that same-sex marriage was a “special rights” issue because sexuality was a matter of behavior rather than race or ethnicity.²⁶⁶ By February 2004, a number of African-American churches had come out against *Goodridge* and its constitutional justification for same-sex marriage.²⁶⁷ In a radio advertisement aired by opponents of *Goodridge*, a prominent African-American minister stated that “[s]ame-sex marriage [was] no civil rights issue.”²⁶⁸

By 2004, alliance-building in the same-sex marriage debate outside of Massachusetts had also focused on constitutional equality and the legacy of the civil rights movement. In December of 2004, Dr. Martin Luther King Jr.’s daughter Bernice Albertine King led 10,000 marchers calling for the civil rights movement to speak with “a unified voice” against same-sex marriage and in favor of “basic, fundamental moral beliefs.”²⁶⁹ At the same time, Coretta Scott King and other members of the civil rights movement publicly supported the same-sex marriage movement and its claims of constitutional equality.²⁷⁰ In the winter of 2005, Mark Leno, another prominent civil rights leader and pastor, proposed a same-sex marriage bill in the California Legislature.²⁷¹ When asked why he supported the measure, Leno explained that the bill should be endorsed by anyone “call[ing] for equal rights.”²⁷²

Further debate about the meaning of constitutional equality and the legacy of the civil rights movement played out in the courts. In 2006 in *Lewis v. Harris*,²⁷³ a New Jersey same-sex marriage case, the National Black Justice Coalition, an organization composed of 3,000 gay, lesbian, and transgender African Americans, submitted a brief comparing antisegregation laws to current marriage laws.²⁷⁴ By

265. See *id.* (mentioning the position of Julian Bond); Lynette Clemetson, *Both Sides Court Black Churches in the Battle Over Gay Marriage*, N.Y. TIMES, Mar. 1, 2004, at A1 (describing the position of the National Black Justice Coalition).

266. See, e.g., *Gay Marriage, Civil Rights Aren’t Linked, Some Blacks Say*, ST. LOUIS POST-DISPATCH, Nov. 30, 2003, at A4.

267. See Michael Paulson, *Black Clergy Rejection Stirs Gay Marriage Backers*, BOSTON GLOBE, Feb. 10, 2004, at B1.

268. Yvonne Abraham, *Gay-Marriage Lobbying Builds: Activists on Both Sides Converge on State House for Crucial Session*, BOSTON GLOBE, Mar. 10, 2004, at B1.

269. Ellen Barry, *March Clouded by Stand on Gay Unions*, L.A. TIMES, Dec. 11, 2004, at A18.

270. See *id.*

271. See *Black Leaders Join Leno in Backing Gay Unions*, SUN REP., Jan. 6, 2005, at 3.

272. See *id.*

273. 908 A.2d 196 (N.J. 2006).

274. See Brief Amicus Curiae and Appendix on Behalf of the National Black Justice Coalition at 1-3, *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006) (No. 58,389), available at

2008 when the California Supreme Court was considering its own same-sex marriage case, amici on both sides claimed to speak for the civil rights movement and to understand the meaning of constitutional equality.²⁷⁵

An amicus brief submitted in that case by a group of African-American pastors rejected the analogy that had been drawn in the National Black Justice Coalition's *Lewis* brief, claiming that marriage laws were "firmly rooted in the biology that defines human nature and reproduction."²⁷⁶ To equate the civil rights and same-sex marriage movements, the brief argued, was to insult the African-American community and to send "another unwelcome reminder that state and local government officials sometimes do not . . . have a firm grasp of the history that continues to shape the challenges that lie ahead for our communities."²⁷⁷ Describing the antiscegenation analogy as "deeply offensive" to the African-American community, the brief contended that it was only the advocates of same-sex marriage who had made discriminatory arguments like those "that shaped the Supreme Court's rulings in *Dred Scott* and *Plessy v. Ferguson*"—arguments that "denie[d] the relevance of human nature and biology."²⁷⁸ Similarly, a brief submitted by the evangelical California Ethnic Religious Organization for Marriage (CEROM) rejected the antiscegenation analogy because marriage was not "a tool to promote invidious discrimination" but a way to reinforce the commitment of a husband and wife "to one another and to the children they may create."²⁷⁹

http://www.lambdalegal.org/sites/default/files/legal-docs/downloads/lewis_nj_20051021_amicus-national-black-justice-coalition.pdf. *Lewis* held that same-sex couples were entitled to identical and equal legal treatment, but the decision did not require the New Jersey Legislature to designate same-sex relationships formally as "marriages." *Lewis*, 908 A.2d at 224.

275. In *In re Marriage Cases*, the California Supreme Court held that the availability of domestic partnerships and the denial of marriage to same-sex couples violated the State Equal Protection Clause. See *In re Marriage Cases*, 183 P.3d 384, 453 (Cal. 2008). For a sample of the briefs submitted in the case, see Brief Amicus Curiae of California Ethnic Religious Organizations for Marriage ("CEROM") in support of Appellees, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S147999) [hereinafter Brief of CEROM]; Brief of Amicus Curiae California NAACP in Support of Parties Challenging the Marriage Exclusion, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S147999) [hereinafter Brief of the California NAACP]; Proposed Brief of Mexican American Legal Defense and Education Fund, et al. in Support of Respondents Challenging the Marriage Exclusion, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S147999) [hereinafter Brief of the Mexican American Legal Defense and Education Fund]; Brief Amici Curiae of African-American Pastors in California in Support of Respondents, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S147999) [hereinafter Brief of African-American Pastors].

276. See Brief of African-American Pastors, *supra* note 275, at 1-4.

277. See *id.*

278. See *id.* at 4.

279. See Brief of CEROM, *supra* note 275, at 11-12.

On the other side, amici for the California NAACP and a variety of minority rights organizations read antimiscegenation cases as prohibiting the creation of separate institutions for disadvantaged groups. The California NAACP asserted that *Goodridge* had made the same “argument in favor of legalizing marriage by interracial couples . . . with words like ‘same-sex’ replac[ing] words like ‘interracial.’”²⁸⁰ A variety of Hispanic and Asian organizations also endorsed the antimiscegenation analogy.²⁸¹ In applying state equal protection analysis, one of these briefs pointed to the shared experiences of gays and minorities in facing the “stigma of inferiority,” “second-class citizenship,” and “past discrimination.”²⁸²

By making civil rights a central issue in the discussion of same-sex marriage, *Goodridge* prompted civil rights leaders to take sides for the first time. By helping to present same-sex marriage primarily as an issue of constitutional equality, *Goodridge* also created coalition-building opportunities for MGLPC and GLAD that had not been available before the decision.

VI. CONCLUSION

Over the past year debate about the value of same-sex marriage litigation has intensified. Two successful suits, *Perry* and the consolidated cases in *Gill*, have held unconstitutional important anti-same-sex marriage laws. But even if the final outcome of these cases in the federal courts is favorable to the same-sex marriage movement, many critics suggest that the decision to litigate *Perry* and *Gill* was foolish. These commentators contend that the harm done by backlash will outweigh any potential benefits.

Many of these commentators rely on a particular historical narrative of the impact of past litigation. According to this account, the litigation of cases like *Baker* and *Goodridge* served primarily to produce backlash. Because of resistance to the decision, opponents of same-sex marriage performed well at the polls and new state constitutional bans on same-sex marriage appeared.

However, the history on which these critics rely is incomplete. *Baker* and *Goodridge* not only produced backlash but also allowed some within the same-sex marriage movement to reshape the arguments and coalitions that defined the same-sex marriage debate. Before the decisions, equality-based claims played a marginal role in the advocacy of major gay rights organizations like the Freedom to Marry Coalition and the Human Rights Campaign. When, before the

280. See Brief of the California NAACP, *supra* note 275, at 11.

281. See, e.g., Brief of the Mexican American Legal Defense and Education Fund, *supra* note 275.

282. See *id.* at 14.

decisions, gay rights groups emphasized privacy- or equal-pay-based arguments, libertarian and labor organizations joined the call for legal recognition of same-sex relationships. The opposition to same-sex marriage also used different rhetorical tactics before *Goodridge*. Organizations like the TVC, Focus on the Family, and the Family Research Council emphasized claims about the illegitimacy of homosexuality or the necessity of defending marriage.

Baker and, to a greater extent, *Goodridge* appear to have played an important role in changing the arguments and coalitions on either side of the debate. Both decisions highlighted equality-based reasoning and rhetoric. Gradually, as gay rights leaders adopted these claims, same-sex marriage was repackaged as an issue of civil rights. In the same period, in responding to *Goodridge*, opponents of same-sex marriage stopped openly justifying the unequal treatment of gays. Instead, opposition organizations began claiming that the equality- and anti-discrimination concerns outlined in *Goodridge* weighed in their favor.

The history of these decisions shows that same-sex marriage litigation likely has had a more complex and profound impact than current scholarship suggests. It is too early to determine whether the effects studied here will advance the same-sex marriage cause in the long term, but before scholars evaluate whether same-sex marriage litigation has harmed or helped the gay rights movement, they should account for all, not for some, of the effects of decisions like *Baker* and *Goodridge*. By refocusing discussion about gay marriage, these decisions allowed activists to alter the contentions and alliances that shaped the struggle. In the future, in cases like *Perry* and *Gill*, the decision to pursue litigation may seem to be much wiser than many currently think.